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19543

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF W. N. COLER & COMPANY.

Statement of the Case.

This case comes before this Court on a certificate made by the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this Court certain questions for instruction to guide the said Judges in their disposition of this case.

The questions are set forth in the record, pages 42 and 43.

This suit was brought by W. N. Coler & Co., in the United States Circuit Court for the Western District of North Carolina, on certain bonds issued by the county of Wilkes, in the State of North Carolina, a copy of which bonds is set forth in the record (p. 24), and is made part of the complaint in this cause (Record, p. 6, paragraph 24). The defendants to the bill were the Board of Commissioners of Wilkes County and Clarence Call, ex-Sheriff and County treasurer, and John H. Johnson, the present Sheriff and County treasurer. The County and Call filed answers.

The form of these bonds is admitted by the answers (Record, p. 15, paragraph 24, and Record, p. 20, paragraph 1).

These bonds bear date October 1, 1889 (Record, p. 24), and were issued on or about said date (Record, p. 6, paragraph 24 of complaint).

This also is admitted by the answers (Record, p. 15, paragraph 24, and Record, p. 20, paragraph 1).

The complaint (Record, p. 6, paragraphs 25 and 25*a*) states that the said bonds were duly sold, and that the plaintiffs became the *bona fide* purchasers thereof. The answer of the defendant Board of Commissioners of the county denies any knowledge or information sufficient to form a belief in regard to this allegation (Record, p. 16, paragraph 25). The answer of the county sheriff admits the truth of the allegation (Record, p. 20, paragraph 2). The certificate made by the Judges of the Circuit Court of Appeals (Record, pp. 42 and 43) propounds certain questions to this Court on the hypothesis that the plaintiffs are the *bona fide* purchasers and holders of such bonds, and they must, therefore, be deemed such in the consideration of the questions certified.

The complaint (Record, p. 2, paragraph 4) alleges that the interest was regularly paid on these bonds for about eight years (admitted by answer, Record, p. 9, paragraph 4). The complaint also alleges (Record, p. 2, paragraph 6), that certain taxes had been levied for subsequent years and collected, and that these sums of money were in the hands of the sheriff, who was *ex officio* the treasurer of the defendant county of Wilkes. This was admitted by answer of the Sheriff (Record, p. 20, paragraph 1). The complaint also alleged that there was a contest among the respondents for the possession of said sums of money, and that the respondents, unless restrained, will dispose of these sums of money (Record, p. 7, paragraph 26). The complaint (Record, p. 7) prays for an accounting of these moneys by the defendant treasurer of the county, that a receiver be appointed, and for an injunction, and for such other, further and general relief as the premises may warrant and the rules of equity allow.

The defendant the Board of Commissioners of the county of Wilkes filed an answer (Record, p. 8), and the defendant Clarence Call, the sheriff and *ex officio* treasurer of the county, also filed an answer (Record, p. 20). These answers substantially admitted the allegations of the complaint with regard to the issue of the bonds, the payment of interest, the actual construction of the railroad to aid which the bonds were issued, etc., etc., but set up as defenses that the bonds were issued without authority of law. These defenses will be considered later on in this brief so far as they are pertinent to the questions certified to this Court.

The Circuit Court rendered a decree (Record, p. 41), reciting that the cause came on to be heard upon the

bill, answers, replications and former orders, exhibits and other evidence in the cause, and adjudging that the sheriff and ex-sheriff, *ex officio* treasurers of the county, are the lawful trustees of the bondholders, and hold the sum of $13,000 mentioned in the bill [being taxes collected for the payment of interest on these bonds] as such trustees, for the benefit of said bondholders, and for the purpose of paying off and discharging the interest due on said bonds, as set out in the bill. The Court appointed a receiver, and directed that the said $13,000 be paid to such receiver and held by him until the further order of the Court.

An appeal was taken by the defendants from this decree to the United States Circuit Court of Appeals for the Fourth Circuit (Certificate of Judges, Record, p. 42). The Judges of the said Court, after hearing arguments upon the said case, made their certificate certifying certain questions or propositions of law to this Court for their instruction and guidance in disposing of the case (Record, p. 42).

ARGUMENT.

The certificate certifying the questions to this Court was made in substantially the same form as the certificate made by the same Circuit Court of Appeals in the case of *Folsom vs. Ninety-Six*, 159 U. S., 611, 614.

THE FIRST QUESTION CERTIFIED.

The first question certified is as follows (Record, p. 42):

"Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other

evidence, and matters and things recited herein, the circuit court of the United States was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases :

Commissioners of Wilkes County vs. Clarence Call *et al.*, 123 North Carolina Report, 308 ;

Bank vs. Commissioners, 119 N. C. Rep., 214 ;

Commissioners vs. Snuggs, 121 N. C. Rep., 394 ;

Radman vs. Washington, 122 N. C. Rep., 39 ;

Commissioners vs. Payne, 123 N. C. Rep., 432 ;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State :

Article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7."

The above-mentioned case of *Commissioners of Wilkes County vs. Clarence Call et al.*, 123 N. C., 308 (1898), was a suit in equity brought in the State Court on or about the 23d day of December, 1897, by the commissioners of the county of Wilkes against Clarence Call, as treasurer of the County of Wilkes, to enjoin him from paying any further interest upon the bonds which are now involved in this case. This is the suit referred to in the complaint in this cause (Record, p. 3 of complaint, paragraph 7 *et seq.*). The plaintiffs in this cause were not parties to the said suit, and the decree in the said suit of course does not bind them. The only parties to the said suit, as stated above, were the county commissioners, as plaintiffs, against the county treasurer as defendant—both plaintiffs and defendant really representing the county. It is to be added, however, that J. M. Turner and J. M. Wellborn,

alleging that they were the owners of one of the bonds of the county of Wilkes, were allowed (after appeal to the Supreme Court of North Carolina) to make themselves parties to the said suit, as fully stated and set forth in the complaint in this cause (Record, p. 4, paragraph 12 *et seq.*). It is alleged in the complaint that the said Turner and Wellborn were not owners of the said bond, but obtained the same for the purpose of becoming parties to the said proceeding, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds (Record, p. 16 of complaint). It is also alleged that the county commissioners paid $24.30 costs, which were decreed against the said Turner and Wellborn (Record, p. 5, paragraph 16), thus showing that the said Turner and Wellborn were acting with the county commissioners. It is expressly stated in the report of the said case of *Commissioners vs. Call*, 123 N. C., 308, that no counsel appeared in that court in opposition to the county commissioners—that is, no counsel appeared in that court on behalf of Turner and Wellborn, nor on behalf of the defendant Clarence Call—so that the arguments and proceedings in the Supreme Court of the State were really *ex parte*, only the county commissioners being represented there.

On this point the Supreme Court of North Carolina, in its opinion in *Commissioners of Wilkes County vs. Clarence Call, Sheriff and ex-officio Treasurer of Wilkes County et al.*, 123 N. C., 308, says:

"It has been suggested" (p. 327) "that the defense in this case has been only colorable, as but one of the bonds was represented. Under the circumstances, we think that was sufficient. An elaborate *answer*, evidently prepared by able counsel, has been filed presenting every reasonable defense; and, while *no argument was made before us for the defendants*, every phase

of the case has been carefully examined by us in the five months during which we have held it under advisement."

On this point Mr. Justice FURCHES, in the dissenting opinion, says (p. 332) :

" It has not escaped my attention that there is in the printed record an agreement as to what Acts are to be considered by the Court in deciding this case, and the Act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs [Commissioners of Wilkes County], and by counsel for Mr. Turner and Mr. Welborn, but it is not signed by anyone for the defendant Call. But, if it had been signed by Call, I would have to disregard it."

Again, on page 336 :

" The court in its opinion says that certain positions were strenuously insisted on by the defendant. I think this must be a mistake, as *the case was not argued before us, either by brief or by oral argument, on behalf of the defendants.* Mr. Turner and Mr. Welborn by leave of the court made themselves parties defendant after the action was brought, but *they have given the case no further attention.* Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But as to the conduct of the case before this Court is concerned, it has been unilateral."

This decision, made more than eight years after the bonds in suit were issued and sold and which was *ex parte*, and in which the bondholders were not heard and in which the plaintiffs in the present cause were not parties—this decision is one of those which the County now insists is absolutely binding upon the Federal Courts in the decision of the present cause.

The first question certified to this court is " Whether, upon the averments of the bill of complaint, answers," etc., accompanying the certificate in this case, the United States Circuit Court of Appeals was bound in

passing upon this case by the decision of the Supreme Court of North Carolina in the said case of *Commissioners vs. Call*, 123 N. C., 308, and other cases. Of course the plaintiffs, not being parties to that cause, were not bound by the decree as an estoppel, or as making the matter of the litigation *res adjudicata*.

The question propounded to this Court, however, is, as we understand it, Whether the United States Circuit Court of Appeals, as a United States court, in passing upon the validity of these bonds in this case, is bound by the decision of the State Supreme Court in *Commissioners vs. Call*, 123 N. C., and by the decisions of the State Supreme Court in the other cases above cited, in forming its opinion and rendering judgment in this case. All of the cases cited were decided by the Supreme Court of the State of North Carolina long after the bonds in question in the present case had been issued. The principle is well established in numerous cases in this Court that:

"When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued" (Opinion of Mr. Justice BRADLEY, *Burgess vs. Seligman*, 107 U. S., 20, 33, 34, quoted by Mr. Justice GRAY, in the case of *Folsom vs. Ninety-six*, 159 U. S., 611, 625).

The case of *Folsom vs. Ninety-six* was a case arising in South Carolina, where the Supreme Court of the State, after certain railroad aid bonds were issued, rendered decisions holding them invalid, and the Supreme Court of the United States expressly held, in answer to questions certified by the United States Cir-

cuit Court of Appeals for the Fourth Circuit, that the federal courts were not bound by such subsequent decisions. In this case of *Folsom vs. Ninety-six* the question arose on the construction of the *constitution* of the State of South Carolina, and this Court held that the same rule applied as respects subsequent decisions of a state Supreme Court construing its state constitution as applied in subsequent decisions construing state statutes. In neither case are the federal courts bound by such decisions.

This case of *Folsom vs. Ninety-six* is a case exactly in point, and it requires that this Court make an answer in the negative to the first question certified by the Judges of the Circuit Court of Appeals in the present case, namely, to answer that that court is not bound in passing upon this case by the decisions of the courts of North Carolina rendered in the case of *Commissioners vs. Call*, and others above cited.

We have said, advisedly, that the case of *Folsom vs. Ninety-six*, 159 U. S., 611, is in point. We observe that the learned counsel on the other side (brief of Judge AVERY, page 42), says :

> " The plaintiffs' case is distinguished from *Folsom vs. Ninety-six*, in that in Folsom's case it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the bonds. In our case the Supreme Court of North Carolina have reiterated the statement in all of the cases cited in the certificate, that the Court had never at any time before the bonds were issued rendered any decision in conflict with *Bank vs. Commissioners*, 119 N. C., 214."

The learned counsel is mistaken in saying that it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the

bonds. Thus, in *Floyd vs. Perrin*, 30 S. C., page 1, the Court says, at page 20, as follows :

" It is said, however, that this court has, in at least two cases, impliedly, though not expressly, recognized the power of the general assembly to invest townships with the taxing power (*Chamblee vs. Tribble*, 23 S. C., 70, and *Railway Company vs. Tribble*, 25 *Id.*, 260). It is not, and cannot be, pretended that the question now presented was either raised, considered, or decided in either of these cases, but the claim is that the power now brought in question was, by implication, recognized."

Referring to this matter, the Supreme Court of the United States, through Mr. Justice GRAY, in *Folsom vs. Ninety-six*, at page 627, says :

" There *not being shown to have been a single decision of the state court against* the constitutionality of the act of 1885 before the plaintiff purchased his bonds, *nor any settled course of decision upon the subject*, even since his purchase, the question of the validity of these bonds must be determined by this court *according to its own view* of the law of South Carolina."

We repeat, therefore, that the learned counsel is mistaken in his attempt to differentiate *Folsom vs. Ninety-six* from the present case.

The Supreme Court of South Carolina, in its attempt to hold the bonds invalid in the case of *Floyd vs. Perrin*, pretended not to overrule any prior cases decided before the said bonds were issued, just as the Supreme Court of North Carolina in the *Oxford County case* and the other cases mentioned in the first question certified in this case has pretended not to overrule its prior decisions rendered before the bonds in question were issued. This Court determines for itself whether the later decisions overruled former decisions, and, if there were no former decisions adverse

to the validity of the bonds at the time they were issued, then this Court will take up and consider the matter on the state of the adjudications which did exist at the time; and, if there were no decisions in favor of the validity of the bonds, then this Court will consider the case *de novo*, and will, as stated by Mr. Justice GRAY in the said case of *Folsom vs. Ninety-six*, page 627, determine the case "*according to its own view.*"

The case of *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, is cited by the learned counsel for Wilkes county, Judge AVERY, in his brief (p. 6), as an authority in support of the proposition that the United States courts are bound to follow a decision of the Supreme Court of the State rendered *after* bonds were issued. That case does not support any such doctrine. On the contrary, Mr. Justice GRAY states that case as follows (105 U. S., 667, 668):

"These actions are brought upon municipal bonds purporting to have been issued under an act of the General Assembly of Illinois of February 18, 1857. The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October Term, 1876, and the principles then affirmed must control the present decision. (See *Town of South Ottawa vs. Perkins* and *Supervisors of Kendall County vs. Post*, 94 U. S., 260). Those principles may be summed up as follows:

First. By the law of the State of Illinois, as often declared by the Supreme Court of that State, **before** as well as after the execution of the bonds in suit, the provisions of the Constitution of 1848, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but, if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the

presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void."

It will thus be seen that Mr. Justice GRAY states that the decisions in Illinois holding that resort might be had to the journals to overthrow an enrolled act were rendered *before* the bonds in question in that case had been issued. On looking at the report of those cases, 94 U. S., 260, we find that this Court says:

"As early as *1853* it was decided, in *Spangler vs. Jacoby*, 14 Ill., 297, that it was 'competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether.'"

The act under which the bonds in question in those cases were issued was not passed until February 18, 1857, *four years after this decision of the Illinois Court in Spangler vs. Jacoby*, 14 Ill., 297, rendered in 1853, and the bonds were issued years afterward.

The learned counsel, therefore, is clearly mistaken in stating that these cases of *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, and similar cases, 94 U. S., 260, are like the present case.

The first question propounded is, Whether these cases, "considered in connection with prior decisions of said court" and certain provisions of the constitution of said state, were binding upon the United States Circuit Court of Appeals in passing upon this case. This form of the question certified renders it necessary to consider the "prior decisions" of the State Court. We proceed to consider these prior decisions in this brief so far as it seems to us necessary to enable the Court to dispose completely of the present case.

In order to arrive at an intelligent understanding of these prior decisions, it is necessary to state the Ordinance of March 9, 1868, adopted by the Constitutional Convention and the legislation applicable to this issue of bonds.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to Incorporate the Northwestern North Carolina Railroad Company," gave, per se, clear and complete authority to the County of Wilkes to issue the bonds in question, and this proposition was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 24 to 27. This ordinance provided in section one :

" That, for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of

two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations *and* COUNTIES, in shares of one hundred dollars."

Section 12 of the said ordinance provided:

"Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all *counties* or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said section 12 of the said ordinance, is the act, chapter 156, of the laws of North Carolina, session of 1852, sections 33 to 37 of which are printed in the record, page 31, and said sections 33 to 37 are by such reference adopted and made party of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said act of 1852 provides:

"It shall be lawful for *any incorporated town or county, near or through which said railroad may pass*, to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabit-

ants of said town or the citizens of said county, in manner and form as hereinafter provided" (Record, p. 31).

The language of section 2 of the ordinance above quoted is general—that "the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties.*" So also the language of section 12 of said ordinance is general —"*all* counties or towns subscribing stock." The said section 2 and the said section 12, if standing alone, would clearly include counties generally. The said section 33 of the act of 1852 provides that "it shall be lawful for *any incorporated town or county, near or through which said railroad may pass.*" If this operates in any way to restrict the otherwise general language of said sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the county of Wilkes is embraced within the language of said section 33. A glance at the map of the state of North Carolina shows that a railroad constructed "from some point on the North Carolina Railroad between the town of Greensboro, in Guildford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass near or through Wilkes county.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of 1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in section

12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county (Record, p. 31). Section 35 of said act of 1852 provides:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be *paid for in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county" (Record, p. 32).

The language of section 12 of the said ordinance is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. *(See cases on this point in* MR. PRICE'S BRIEF, pp. 41-42.) The method of paying said subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the

making of the said subscription. It was so held, prior to the issues of the bonds now in suit, by the Supreme Court of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below quoted. No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852. Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of the majority of the qualified voters of Wilkes County.

The said bonds now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes" (Record, p. 24).

The complaint in the present case alleges (Record, p. 6, paragraph 22) :

" That the county of Wilkes, acting through its Board of Commissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company, a proposition to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

The answer of the county commissioners (Record, p. 15, paragraph 22) avers :

" These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County.

It is also stated in the complaint (Record, p. 6, paragraph 23) that the said railroad was constructed in the said county of Wilkes, and is " the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 14, paragraph 23) also admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself, was and is sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legislature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 gave, per se, lawful authority to issue these bonds.

We here print at length the said two cases just cited, fully and exactly as they appear in the official reports of the decisions of the Supreme Court of the State of North Carolina.

The report of the *Hill* case is as follows :

"John G. Hill et al. vs. The Commissioners of Forsythe County.*

[67 N. C., 367, June Term, 1870.]

An act of the General Assembly authorizing the People of a County to take stock in a Railroad Company, and to determine the question by a popular vote, and tax themselves to pay for it, is constitutional.

[*Taylor vs. Commissioners of Newbern*, 2 Jones Eq., 141; *Caldwell vs. Justices of Burke*, 4 Jones Eq., 323, cited and approved.]

Motion to vacate an injunction heard before CLOUD, J., at.....Term of Forsythe Superior Court.

This was an application on the part of the plaintiffs, who represented themselves as taxpayers and property holders of the county of Forsythe, in behalf of themselves and others, asking for an injunction against

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* "NOTE.—The case of *Simonton vs. The Commissioners of Burke*, involving the same question, was decided at this term, and for the same reasons judgment was given for the plaintiff."

the defendants, to restrain them from the imposition and collection of certain taxes, to pay instalments due upon a subscription made by the county of Forsythe to the North Western North Carolina Railroad Company. The following facts were found by the presiding Judge: 'A majority of the justices of the peace were present at the court house in Winston on the 25th day of March, 1868, and made an order to submit the question of subscription to the qualified voters of the county on the 4th day of April, 1868, and directed the sheriff to open the polls on that day.

That notice of this election was published in two newspapers, printed and circulated in that county; that said election was held at the time appointed, and at the usual places for holding elections in said county, and due return of the result of the voting was made to June Term of the County Court; that a majority of the jutices of the county were present, and on the bench at the said June Term, concurring in the orders made; that a large majority of the qualified voters of the county did vote on the question of subscription, and that a majority of the said votes were cast in favor of subscription; that a subscription of 1,000 shares of stock was made by the agent of the county appointed for that purpose on the_____day of June, 1868; that the defendants have laid taxes to pay the instalments due upon the subscription made to the North Western North Carolina Railroad Company for the years 1870-71.

Upon the foregoing state of facts the injunction, theretofore granted, was vacated by his Honor. Whereupon the plaintiffs appealed to the Supreme Court.

Several errors were assigned. The chief one and the only one discussed by the Court is: 'That the injunction was dissolved and defendants allowed to collect the taxes without any constitutional power in the legislature to authorize the subscription, and without a sufficient compliance with the acts of the General Assembly in that case made and provided.'

Scales & Scales and *Dillard & Gilmer*, for plaintiffs.

Clement, Masten and Batchelor, for defendants.

READE, J.: The main question is whether the legislature has the power to authorize the people of a county to take stock in a railroad, and to determine the question by a popular vote, and to tax themselves to pay for it. The Legislature in 1852 authorized the town of Newbern to take stock in the Neuse River

Navigation Company, for the use of the town, and to issue bonds and to levy a tax upon the property holders of the town to pay them. One of the taxpayers filed a bill to enjoin the collection of the tax, upon the ground that the act of the Legislature was unconstitutional. The question was fully argued and well considered, and the decision was in favor of the constitutionality of the act (*Taylor vs. Comrs. of Newbern*, 2 Jones Eq., 141).

And, again, in 1855, the Legislature chartered the Western North Carolina Railroad Company and authorized any county through which the road might pass to take stock if a majority of the justices of the peace and a majority of the voters should so determine, and to issue bonds and to levy a tax, &c. The county of Burke took stock, and one of the taxpayers filed a bill to enjoin, upon the ground that the act was unconstitutional. But this court decided in favor of the constitutionality of the act, and, in the opinion, it is said: 'In accordance with these views is the case of *Taylor vs. Newbern (supra)*, so that the question may be said to be settled here' (*Caldwell vs. Justices of Burke*, 4 Jones Eq., 323). The defendants' counsel cited, also, decisions in most of our sister States to the same effect. So that we repeat what was said in *Caldwell vs. Justices of Burke*, that the question is settled. We suppose that the plaintiffs' counsel felt at liberty to treat it as an open question, because in *Caldwell vs. Justices of Burke* there was a dissenting opinion by the present Chief-Justice; but the Court was unanimous upon this point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote.

There are divers other points in the complaint which seem to be unfounded, and besides they are unimportant. The main thing—the people's will—seems to have been fairly obtained. The stock was taken; bonds were issued; rights have vested; taxes have been levied and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred, and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few*, who are indulged with

the privilege of suing for a *class*. Only their substantial rights will be considered.

We agree with his Honor that the injunction ought to have been dissolved.

There is no error. This will be certified, &c.

Simonton vs. Commissioners of Burke at this Term.

Per Curiam. Judgment affirmed."

NOTE that the subscription was made at the *June* Term, 1868, at which time the Ordinance was the only source of the authority to subscribe the stock and issue the bonds which were sustained in the *Hill* case just quoted, as well as in the *Belo* case next given, and where the facts relating to the subscription and bonds are more fully stated in the opinion of BYNUM, J.

The report of the *Belo case* is *verbatim* as follows:

"Edward Belo vs. The Commissioners of Forsythe County.

"[76 N. C., 489, January Term, 1877.]

"MUNICIPAL BONDS—CONDITIONS PRECEDENT—ACTION BY PURCHASER FOR VALUE—INJUNCTION BY TAX-PAYER—RETROSPECTIVE STATUTE—JUDGE'S CHARGE—EVIDENCE.

"1. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder.

"2. In an action against a municipal corporation upon a bond issued by it, by a purchaser for value without notice, the plaintiff need only show a *power* in the corporate body to issue the bond.

"3. If a municipal corporation has the power to issue bonds upon certain conditions precedent, and such bonds are issued, the presumption is that the conditions were complied with and the bonds are *prima facie* valid. The corporation, however, can show the contrary, unless it is *estopped* by its own acts from so doing.

"4. When authority to issue municipal bonds upon the performance of certain conditions precedent is con-

ferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not."

"5. In an action by a *bona fide* purchaser for value against a County upon a bond issued by the former County Court of such County under an Act of the Legislature, the records of such Court are conclusive upon the County. The recitals in the bond are also conclusive upon the County and constitute an estoppel *in pais*.

"6. A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities.

"7. It is competent for the Legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute where no contract is impaired, and the rights of third persons are not injuriously affected.

"8. Where the plaintiff testified on the trial below and introduced evidence of good character, and the defendant asked His Honor to charge the jury that they were not bound to believe the plaintiff in passing upon the issue, which His Honor refused, and charged the jury that 'they were not bound to believe anybody,' and added 'that, when men who have proved a good character before the jury testify, the presumption is that they will not lie,' &c. *Held*, not to be error.

"*Chester & Lenoir R. R. Co. vs. Comrs. of Caldwell*, 72 N. C., 486, cited and approved.

"This was an Action for a Mandamus to compel the defendants to provide for the payment of certain bonds alleged to have been issued pursuant to law by the County of Forsythe, tried at Spring Term, 1876, of Davidson Superior Court, before CLOUD, *J.*

"The action was commenced in Forsythe and removed to Davidson.

"The question presented for the decision of this Court is so elaborately discussed by Mr. Justice BYNUM, in delivering the opinion, that a statement of the facts is deemed unnecessary.

"Upon the issues submitted, and under the instructions of His Honor in the Court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendants.

"*Mr. J. M. McCorkle* for plaintiff.

"*Messrs. Dillard & Gilmer, Shipp & Bailey and Watson & Glenn* for defendants.

BYNUM, J.: The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by Section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to Counties and Towns as was conferred by an Act incorporating the Atlantic & N. C. Railroad Company, passed by the Legislature of 1852. By section 34 of the latter Act the Justices of the County through or near which the road was located, "a majority concurring," are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding Court, held in June, 1868.

The minutes of that Term recite that 35 Justices were present, which number is admitted to be a majority of the whole number. At this latter Term of the Court, the Justices ordered the subscription to be made to the capital stock of the Company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his Banking House in Salem, on 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsythe County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868'.

At the same Term at which the subscription was made, the Justices assessed a special tax upon the

County to meet the semi-annual interest on the bonds. This Special Railroad Tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the Railroad Company to the County, which it yet holds; an agent was annually chosen to represent and did represent the County stock in all the meetings of the Company. Under the new State Constitution of 1868, a Board of County Commissioners succeeded to all the powers and duties of the Justices, and up to 1872 this Board unanimously caused the levy and collection of the Railroad Tax and its application to the discharge of the coupons due upon the bonds. But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the County was illegal and void.

I. The plaintiff purchased the bonds in suit of Lemly in May, 1873, *after* they fell due. The bonds were then dishonored, like other commercial paper remaining unpaid at maturity, and the plaintiff is a purchaser with notice of all defects which would invalidate them in the hands of Lemly. He acquired no better title than his transferror. Any defense which could be asserted against the claim of Lemly can be maintained by the County against the plaintiff (1 Daniel on Negotiable Instruments, Sec. 782; *Arrents vs. Commonwealth*, 18 Grat., 773; 14 Minn., 79). The question then is: were the bonds invalid in the hands of Lemly, who purchased them from the County before maturity? The defense to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County, and that in point of fact no such majority did concur, and, therefore, the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained. Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract propositions, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade, every intendment is made in favor of the validity of negotiable instru-

ments. Where bonds have been issued and sold in the market, and have come into the hands of a *bona fide* holder before maturity, as a general rule such bonds are *prima facie* valid, and the *onus* is upon the party impeaching them to show the contrary. This rule, however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a *power* in the corporate body to issue them. But if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as, for instance, as here, in pursuance of a popular vote and the bonds are issued, the presumption is that the conditions have been observed and they are *prima facie* valid, though the defendant may show the contrary unless he is *estopped* by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction. For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the Justices of the County, a majority concurring, was the Court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of a question of fact by the Justices is manifested in two ways: first, by the records of their Court, and, second, by the recitals in the bonds issued by them. The Justices were authorized by the Act to take the sense of the people, declare the result and issue the bonds. Their declaration spread upon the Minutes of the Court and made a record is conclusive against the County in favor of all *bona fide* bondholders without notice. If they purchased, before maturity, they

need look no further (*Marcy vs. Township of Oswego*, 92 U. S. Rep., 637; *Dunning vs. Houston*, 18 Am. Rep., 253, and note). If there was fraud in making the record, or irregularities in the election which would vitiate the bonds upon exceptions taken in apt time, any taxpayer of the County could intervene and enjoin their issue. But this could only have been done before the bonds were issued, negotiated and passed into circulation as commercial securities, with the insignia of validity impressed upon their face (*Chester & Lenoir R. R. Co. vs. Caldwell Co.*, 72 N. C., 486). If intentionally or by neglect the taxpayers fail to protest, interfere or assert their legal rights; if they suffer the election to be held, a false result declared, the bonds to be issued and sold, and the proceeds received by their agents; if for the period of four years they annually submit to a special tax, which is applied in payment of the accruing interest on the bonds; if they still retain the Railroad stock without an offer to surrender it and continue to have it represented in the meetings of the Company, they cannot now disaffirm the acts of their public agents who issued and negotiated the sale of the bonds. They had the opportunity to intervene and protect themselves before the rights of third persons accrued. Their acquiescence is a ratification by the principal of the acts of his agent, and, according to all the leading authorities upon this question, the doctrine of equitable estoppel is a complete bar, and is strictly applied to the enforcement of these municipal obligations (2 Daniel on Neg. Instr., Sec. 479; *State vs. Vanhorne*, 7 Ohio St., 331; *Barrett vs. County Court*, 44 Mo., 201).

While the decisions are very uniform that the record of the Justices Court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the County from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S. Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox County vs. Aspinwall*, 21 How., 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: "In the

leading case of *Knox County vs. Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative Act was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it and the decision in which was concurred in by all the Judges. This position has been more than once re-affirmed in this Court. It was in *Moran vs. Miami County*, 2 Black., 732; in *Mercer County vs. Hacket*, 1 Wall., 83; in *Supervisors vs. Schenck*, 5 Wall., 784, and in *Meyer vs. Muscatine*, 1 Wall., 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has been sometimes announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox vs. Aspinwall*. That has been so firmly seated in reason and authority that it cannot be shaken." To the same effect is the recent case of *Humbolt Township vs. Long*, 92 U. S. Rep., 642. See, also, a valuable summary of the doctrine as established by the decisions of the Supreme Court of the United States by Judge DILLON, 'Law of Municipal Bonds,' Sec. 11, the result of which is that the recitals in the bonds to that effect are conclusive of compliance with the conditions precedent, and constitute an estoppel *in pais* upon the municipalities.

Up to this point the discussion has been upon the idea that the bonds were, in fact, irregularly issued, and were good only in the hands of a *bona fide* purchaser before maturity and without notice. It may well be doubted whether this is not conceding too much. Suppose the plaintiff had been the original purchaser from the County after the bonds matured and, therefore, fixed with notice, and suppose, further, that the County, in defense, could go behind the action of the Justices and the recitals in the bonds, it by no means follows that their invalidity could then be established, for the County was clothed with the power to issue them, and it is admitted that a

majority vote sanctioned the subscription of stock and the issue of the bonds. The real condition precedent was the consent of the tax payers, and that had been thus regularly obtained. The provisions of the Act as to the mode of submitting the question were subordinate and conducive to the main purpose, and may, therefore, be properly considered as directory only and not of the essence. When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the Railroad Company (People vs. Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise, and we do not decide it.

So far, as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This Act in express terms 'ratifies all Acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the County full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said County to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the County in borrowing money to pay such stock subscription.'

The competency of the Legislature to enact retrospective statutes to validate an irregular or defective execution of power by a County corporation is well settled. In *St. Joseph Township vs. Rogers*, 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the Court there decide that this and all defective subscriptions of the kind may be ratified where the Legislature could have originally conferred the power, and that such laws, when they do not impair any contract or injuriously affect the rights of third persons are never objectionable (Dillon's Law of Municipal Bonds, Sec. 21; *Butler vs. Dubois*, 29 Ill., 105; 49 Mo., 225). The ratification operates as a previous author-

ity (2 Daniel on Neg. Instr., 492; Cooley on Const. Lim., Secs. 370-381; *Knap vs. Grant*, 27 Wis., 147).

Declaring, as we do, that the ratifying Act of August, 1868, was a curative Act, and validated both the County subscription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing Act—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law, the bonds were valid and the Court did not err in so declaring.

The only issue submitted to the jury was: 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?' Upon the trial of this issue the plaintiff was introduced and testified as a witness. The defendant requested the Court to charge the jury that they were not bound to believe the plaintiff in passing upon the issue. The Court refused so to charge, but told the jury 'they were not bound to believe anybody, and added that, when men who have proved a good character before the jury testify, the presumption is that they will not lie, and that there was evidence before the jury that the plaintiff was a man of good character, and no witness had been introduced to assail his character.' There was no error in that. Without this reinforcement of a proved good character, men are presumed to tell the truth. The whole theory of jury trials, and, indeed, of all human intercourse, is based upon that presumption.

His Honor expressed himself with needless emphasis, but we do not see that the jury were misled thereby.

It is estimated that the municipal indebtedness of this country has already reached the enormous sum of $900,000,000, and is rapidly increasing, nearly the whole of which is evidenced by negotiable securities issued for almost every conceivable purpose by cities, counties and townships. These bonds represent a large portion of the wealth of the country, and, whether held for investment or active employment, they enter into the complex business of commercial life. This municipal power to issue bonds, which is the growth of the last thirty years, has already overwhelmed the country with an indebtedness which threatens political society and social order to their foundations. No check against our indebtedness is so effectual as that

you must pay as you go, but this is utterly disregarded in the legislation which authorizes the issue of bonds payable at a remote future period. As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and, after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith, with its dismal train of evils. No refuge for repudiation can be found in the legal tribunals of the country. They have sternly resisted every subterfuge to escape the just obligation of these contracts. No branch of the law has been more thoroughly investigated and discussed with the view of setting it upon a just and pure foundation. And it is the glory of the law that, while by the application of legal principles it enforces the discharge of such obligations, it at the same time preserves the public morals in maintaining the integrity of solemn contracts inviolable. In no other practical way perhaps will the taxpayers be sooner brought to a more vigilant watchfulness over their own affairs, and a more careful selection of their public agents (See Dillon on Municipal Bonds, Sec. 1).

There is no error.

Per Curiam. Judgment affirmed."

NOTE that in these cases of *Hill* and *Belo* the very ordinance of the convention of 1868, involved in the present case, was before the Supreme Court of the State of North Carolina, and that court distinctly held that that ordinance *per se*, without the aid of any legislative act, conferred the power upon the county of Forsythe to issue the county bonds in aid of the Northwestern North Carolina Railroad Company, the very railroad to aid which the bonds in question in the present case were issued by the county of Wilkes. The court says in its opinion in *Belo vs. Commissioners supra :*

" BYNUM, J. : The North Western North Carolina Railroad Company was incorporated by an Ordinance of the Convention of 1868, and by Section 12 of the charter the same power to subscribe to the capital

stock of the company and subject to the like regulations and restrictions, is given to Counties and Towns, as was conferred by an Act incorporating the Atlantic and N. C. Railroad Company, passed by the Legislature of 1852. By Section 34 of the latter Act, the Justices of the County through or near which the road was located, 'a majority concurring,' are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription and was so certified to the succeeding Court, held in June, 1868."

The court says further :

"But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor, that the subscription of stock so made by the County was illegal and void.

* * * * * *

"The defence to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County ; and that in point of fact, no such majority did concur, and therefore the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained."

The court also says :

"It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled."

Further, in its decision, the court says:

"*The county was clothed with the power to issue them* [the bonds], and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds. * * *

"So far as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

"II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. * * *

"Declaring as we do that the ratifying Act of August, 1868, was a curative Act and validated both the County subscription and the issue of the bonds, if any defects existed therein—**and it has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing Act**—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law the bonds were valid, and the Court did not err in so declaring."

The Supreme Court of the State of North Carolina has thus distinctly declared that the said ordinance of 1868, printed in the record in this case, page 24 *et seq.*, incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for a county to subscribe to the capital stock and issue county bonds in payment therefor. The court distinctly put its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the court, but is the ground on which the court expressly rested its decision. It is true that the court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and valid-

ated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, this decision in the *Hill case* made in 1870, and this decision in the *Belo case* made in 1877, construing this ordinance of the Constitutional Convention of 1868, was a construction upon which the purchasers of the bonds in question in the present case had a right to rely. When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in any wise changed, either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina, in the two Forsythe county cases, were rendered.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court, notwithstanding the fact that after such contract was made the state Court may, as in the case now at the bar, have changed its decisions.

The provisions of the constitution of the State of North Carolina, mentioned in the said first question, certified by the Circuit Court of Appeals (Record, p. 42)—namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7—were precisely the same at the date of the rendering of the decisions in the two Forsythe county cases above quoted as they were when the bonds in question in the present case were issued.

As stated above, the said ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the legislature attempted to repeal it. Certain additional acts had been passed ; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely the same as it stood when the bonds were issued which were in question in the two Forsythe County cases above quoted.

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 24) recited that they were issued by authority of the act of February 20th, 1879, which was an amendment of the Constitutional ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the

issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

A decision of this Court exactly in point is *Anderson County Commissioners vs. Beal*, 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236):

"It is not disputed that the recital in the bond that it was issued under the act of February 26th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds," etc. * * * (p. 238). "The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription and pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporations," Fourth Edition, section 523, note, it is stated:

"That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power," (citing *Anderson County Commissioners vs. Beal, supra*, and other cases).

See, also, to the same effect: *Knox County vs. Ninth*

National Bank, 147 U. S., 91 ; and *Cairo vs. Zane*, 149 U. S., 122.

Furthermore, even if the rule were not as laid down is *Anderson vs. Beal*, *supra*, these bonds recite (p. 24) that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but on examining this act he will further see that this act (Record, p. 29) is an *amendment* "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight." As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal*, *supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent, in the present case, to refer to this ordinance of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the act of February 20, 1879, there recited.

The learned judge who gave the majority opinion in the case of *Commissioners of Wilkes Co. vs. Call*, 123

N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. That case does not hold any such thing. On the contrary, the whole case is stated in the opinion of this Court, given by Mr. Chief Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crow vs. Oxford*, 119 U. S., 215. See also *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town', which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* that the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers;* and, of course the bonds in that case were held invalid.

The late decision 1898 by the State Supreme Court (123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308,

decided in 1898, by a bare majority, long after these bonds were issued, has undertaken to hold for the first time that the said ordinance of March 9, 1868, adopted by the constitutional convention of 1868 (Record, p. 24) did not confer any power upon Wilkes county to subscribe for these bonds. In attempting to do this the court has undertaken to overrule the decisions in the *Hill case* and the *Belo case*, concerning the Forsyth county bonds, decided in 1870 and 1877, respectively, and above quoted. The court, in the *Call case*, by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements of the court in *Commissioners vs. Call* are obviously incorrect; for example, the court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill* and *Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds there in question.

Again, the Supreme Court of North Carolina, in the *Call case*, say:

(p. 321) "The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14,

is as follows: 'No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows: 'No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.'"

This proposition of the court, and the sections of the constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the constitutional convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the constitution, quoted by the court, is as follows: "No law shall be passed," etc. This, by its very terms, and under all the authorities, is a direction to the legislature. "No law *shall* be passed," etc., obviously means shall hereafter be passed. This Section 14 occurs in Article II., which is devoted to directions to the legislative body, and it prescribes a rule of procedure for the future enactment of laws by the legislature. It does not either expressly or impliedly repeal or annul any existing laws of the state. "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This question was before the Court in *County of*

Scotland vs. Thomas, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendant relies is the fourteenth section of art. II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.

County of Henry vs. Nicolay, 95 U. S., 619.

Louisiana vs. Taylor, 105 U. S., 454.

Macon County vs. Shores, 97 U. S., 272.

Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, Note.

The principle of these decisions is recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where this Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation upon the power of the legislature*, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the constitution of North Carolina, is a " constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality " unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this " constitutional inhibition upon the municipality itself " was not violated.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the constitution, Article IV., Section 19, expressly provides:

" The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides:

" All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Consti-

tution of 1868 to repeal the said ordinance of March 9, 1868.

[That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."]

This Article II, Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII, Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the Constitutional Convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII, Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the act of 1852, Secs. 33-37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to vote upon the question of the issue of the bonds. The

said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II., Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in the said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional convention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Sections 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said Ordinance—even if said sections 6 and 7 can apply to said Ordinance.

The true nature and effect of the said ordinance incorporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*. This is, perhaps, not surprising, as there was no brief

and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

The Said Ordinance Is of the Same Dignity as the Constitution, and as Operative per se by its Own Intrinsic Force and Efficacy. It is not Repealed, Affected or Modified by the Constitution.

A little reflection and an examination of the journals of the constitutional convention of North Carolina of 1868 show that the said ordinance chartering the Northwestern North Carolina Railroad Company was itself in the nature of a constitution, and was not intended to be affected or repealed or modified by anything that appeared in the constitution itself, although, as a matter of fact, there is nothing in the said ordinance, and in the issue thereunder of the bonds of Wilkes county involved in the present case, which is at all contrary to what appears in the constitution of North Carolina. Our proposition now is that the said ordinance of the constitutional convention, being adopted by the said convention, and being ordered printed and put in force as such ordinance of the convention, was in the nature of a special provision governing the issue of these bonds, and, if it were necessary, as it is not, we could maintain the position that this ordinance was to be in force as the special law governing these bonds, whatever might appear in the constitution to the contrary.

The said ordinance is of the same dignity as the constitution, being passed by the same body that

framed the constitution. It was ordered (Section 14) " to be in effect from and after its passage " (Record, p. 27). No power was reserved to alter or repeal it. When accepted by the railroad company which it chartered, as it was accepted, it became, under the Dartmouth College case, a contract with that company, and not capable, there being no reserved power to that effect, of being repealed in any of its essential provisions. The record as well as the decisions in the *Hill* and *Belo* cases, shows that it was accepted by the company prior to April 24, 1868, by action taken under it, pursuant to its provisions, in respect of taking steps to procure subscriptions to its stock by the County of Forsythe, and in other respects.

On its face the ordinance of March 9, 1868, shows that the constitutional convention was dealing with a situation which it deemed exceptionally important, and, therefore, it directly chartered the Northwestern North Carolina Railroad Company, giving it a corporate existence for ninety-nine years, and conferring upon it other powers, including the power of *counties* to make subscriptions to its stock, and also specially providing for State aid to the extent of $10,000 a mile for the first division, between its eastern terminus and Winston and Salem ; this last provision not being dependent upon any further vote or action on the part of the State, and clearly was not repealed by the subsequent adoption of the constitution itself.

As said above, the ordinance was specially ordered by the Convention itself to take effect unconditionally from and after its passage on March 9, 1868, and if the constitution had been voted down in April, 1868 and never adopted by the people, the said ordinance of the 9th of March, 1868 would

have been in full force and unaffected. Dealing with the local and exigent situation, and dealing with it completely in and by the said ordinance, it was not intended that this ordinance should be repealed in any degree, or in any of its provisions, by the constitution, even if the constitution should be adopted and put in force; and even if the constitution should contain inconsistent provisions—and it did not contain any.

The ordinance of 1868 is viable in and of itself, and autonomous, and we can, as above suggested, well maintain that no part or provision of it could be or was repealed or affected by any inconsistent provision in the constitution. But it is not necessary in this case to maintain that proposition in its full extent for the reason that **there is nothing in the constitution as adopted, which repeals or annuls the power in Wilkes County to issue the bonds in question, or which is inconsistent with said ordinance, as we now proceed further to show.**

There in neither an EXPRESS **nor** IMPLIED REPEAL **of the Ordinance of March 9, 1868, and the issue of the bonds in suit did not violate any provision of the Ordinance or of the Constitution.**

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852 (printed in the record, pp. 31 and 32), at the very utmost the constitution would affect the said ordinance

only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority voting of the qualified voters of the county. The constitution, Article VII, Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (Record, p. 6, paragraph 22) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (Record, p. 15, paragraph 22) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the cspital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites (Record, p. 24) that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance is not recited in the bond, see *Anderson County vs. Beal*, 113 U. S., 227, quoted *supra*, p. 36.

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state, which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief *(supra,* p. 40,*)* Section 14 of Article II has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and, also, refers only to laws to be passed by the General Assembly, since it prescribes the method and manner of its passage by readings on three different days, and taking the ayes and noes on the second and third readings in *each house,* and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house.*

We proceed to consider briefly the journals of the constitutional convention, showing that it was the true intent and purpose of that convention that the said ordinance should operate by itself, and independently of the constitution.

The convention met on January 14, 1868. On February 13, 1868, the committee on the provisions of the constitution which should relate to the legislature made its report (Journal, p. 189). Section 17 of the said report was presented as it now appears as Section 14 of Article II. of the constitution, as printed in the Code of 1883, except that the present words "and agreed to by each house respectively" were inserted, instead of the words "agreed to by a majority of the whole number of members of each house respectively," as they appeared in the first report (Journal, p. 197). This report which now constitutes Article II. of the constitution of 1868 of North Carolina, was on Feb-

ruary 13, 1868, read and considered section by section, and the entire report was adopted, including Section 17—now Section 14—as above stated and quoted.

On March 5, 1868, the committee on counties, cities, towns and villages, their offices, organization and powers, presented their report, which report constitutes now what is Article VII. of the constitution of 1868. The said report contained, among others, Section 8, now Section 7, exactly as quoted above, except that the words "*municipal* corporation" now appear where, in the original report, the words were "*political* corporation" (Journal, p. 315). Included in this report was also Section 13, now Section 12, of Article VII., the same as it now stands and as it is above quoted in this brief, page 42. The said report on counties, etc., was, on March 5, 1868, considered section by section, and was, on the same date, ordered to be placed on its third and final reading and passage on March 7. On the latter date—to wit, March 7, 1868—after reading and considering the said report, the Convention adopted it by a yea and nay vote (Journal, p. 352).

Afterwards—to wit, on March 9, 1868—the committee on internal improvements, to whom had been referred, on February 24, an ordinance to incorporate the Northwestern North Carolina Railroad Company, the very ordinance now printed in the record in this case (p. 24), reported to the convention that they had the same under consideration, and recommended its passage (Journal, p. 363). This ordinance, after being considered by the convention, was then adopted by a vote of 84 yeas and 11 nays, the same being in the form set forth in the record in this case (p. 24).

Thus, the facts were that the convention, after hav-

ing considered, passed upon and formally adopted the whole of Article II., relating to the legislature of the state, including the present Section 14 and other sections, and after having considered and formally adopted Article VII., including Section 7 and other sections relating to counties, towns, etc., which the Supreme Court of North Carolina now say were intended to repeal the ordinance incorporating the Northwestern North Carolina Railroad Company, considered and adopted and put into immediate effect the said ordinance. *The chronology of the acts of the convention completely refutes the proposition now advanced by the Supreme Court of the state.* It is absurd to suppose that this convention solemnly adopted, on the 9th of March, 1868, this ordinance to incorporate the Northwestern North Carolina Railroad Company with the intention of having that ordinance repealed and overthrown by what that convention had already done on the previous dates of February 13, 1868, and March 5 and 7, 1868. On the contrary, this convention intended that this ordinance adopted on the 9th of March, 1868, should stand, and should be the law governing this Northwestern North Carolina Railroad Company. No other possible conclusion can be sustained.

Furthermore, that all the ordinances of the Convention should go into effect and remain in force, is, if possible, made more certain by the subsequent action of the convention. On March 13, 1868, the convention passed the following ordinance, to wit (Journal, p. 437):

"An ordinance in relation to the printing of the constitution, ordinances and resolutions.

"SECTION 1. Be it ordained by the people of North Carolina in convention assembled, That *every ordinance*

and resolution *of this convention*, when the same shall have been enrolled, shall be authenticated by the signatures of the president and the principal secretary of this convention, and the date of its final passage shall be affixed thereto, and *such ordinances* and resolutions *shall go into effect* from such date, unless some other be prescribed, or unless such ordinance or resolution shall be required to be submitted to the people for ratification.

"SECTION 2. Be it further ordained, That all such enrolled ordinances and resolutions, and also the journals of the convention and all the papers belonging to the convention, immediately upon the adjournment thereof, shall be deposited by the president and secretary of the convention in the office of the secretary of state for the State of North Carolina."

[Sections three and four relate to the printing of copies of the constitution, ordinances and resolutions, and the publication in newspapers, and section five relates to the compensation of the secretary.]

Section 6 provides:

"Be it further ordained, That the *printed copies* of the constitution, and *of all the ordinances* and resolutions of the convention printed by authority of the convention, or which shall be hereafter printed by authority of the General Assembly of North Carolina, shall be admitted as evidence in all courts of this State" (Journal, p. 437).

Here, then, we have the express provision of the constitutional convention that every ordinance of this convention *shall go into effect* from the date of its passage, unless such ordinance shall be required to be submitted to the people for ratification; also, that the printed copies of all the ordinances shall be admitted as evidence in all courts of this state. This ordinance was not required by the convention to be submitted to the people of the state for ratification. Only the constitution was so submitted to them.

On the next day, March 14, the convention passed an ordinance submitting the constitution to the voters of the state for ratification, such vote to be had on April 21, 22 and 23, 1868, and the constitution was afterwards ratified.

On this record of the constitutional convention of North Carolina there can be but one conclusion as respects the said ordinance incorporating the Northwestern North Carolina Railroad Company; namely, that the said ordinance was intended by the said convention to go into full force and effect, and to be the law governing the said railroad. As above stated, this ordinance has never been repealed, nor has the legislature attempted to repeal it; and, if it were necessary, we might maintain here that the legislature could not repeal it.

That it is competent to refer to the Journals of a constitutional convention to see how an enactment of such convention is built up, see *Matter of Woolsey*, 95 N. Y., 135; and see, also, *Marshall vs. National Bank*, 23 Wall., 307; and *Edger vs. Board of Commissioners*, 70 Ind., 358.

This ordinance, of March 9, 1868, as appears above, was held, in the two Forsyth county cases, to be full and sufficient authority, *per se*, for the issue of the bonds there in question. Precisely on the same grounds and principles it is full authority *per se*, for the issue of the Wilkes county bonds involved in the present case, the same having been duly sanctioned by the qualified votes of Wilkes County.

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call, 123 N. C., 308* (p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners*, 76 N. C., 289, by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 489, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by recitals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the court in the

case of *Commissioners vs. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court, on page 497, says "does not arise" is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the court in *Belo vs. Commissioners*, to wit:

"When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company *(People v. Supervisors*, 27, Cal., 655*)*. As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners:*

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said:

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, we desire to call the attention of this Court to what is obviously an

error in the statement of facts in the dissenting opinion of Justice FURCHES. He says:

(p. 328) "On the *25th of March*, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*, 67 N. C., 367."

The date, March 25, 1868, is obviously an error. This error is quoted and repeated from time to time by the learned counsel Judge AVERY in his brief in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the Case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said Court, at the June Term, ordered the subscription to be made *(supra*, pp. 20, 24*)*. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, *supra*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868," *(supra*, p. 24*)*, so that the said bonds could not possibly have been issued before the 11th of August, 1868.

On this state of facts, the theory advanced by the

Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners*, and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the ordinance of March 9, 1868, had not expired by limitation in 1889, when the bonds in suit were issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the court says: "Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter." This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Com-Company, nor in the parts of the act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company" (Record, p. 27). This reference to the act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference,

make the act of 1852 a part of the said ordinance, with respect to the corporate life and existence of the company, and the six years' provision in Section 45 of the act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly covered by other provisions of the said ordinance of 1868. Section 1 of the charter expressly provides that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*" (Record, p. 25), and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture prescribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance (Record, p. 26) provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its

"*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable,*" and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)*, above quoted, that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Carolina Company Railroad, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, on the northwestern boundary line of the state of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its

railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only by *quo warranto* proceedings. There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited, and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The first question certified should be answered "No."

We therefore submit that clearly this Court should answer in the negative the first question certified to it by the United States Circuit Court of Appeals—namely, the question whether that court is bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the case of *Commissioners vs. Call*, 123 N. C., 308, and the other cases cited in the question, "considered in connection with prior decisions of said court and the following provisions of the constitution of said state: Article II., sections 14

and 16; Article V., sections 1, 4, 6 and 7, and Article VII., section 7."

In addition to the foregoing there are certain other "prior decisions of said court" of North Carolina (referred to in POINT II., *infra*), under which the bonds in question in the present case are clearly valid, and for this reason also the said first question certified—namely, whether the Circuit Court of Appeals was bound by the decisions in the case of *Commissioners vs. Call*, 123 N. C., 308, and other cases decided after the issue of the bonds in question in the present case should be answered in the negative.

II.

Under the decisions of the Supreme Court of the State of North Carolina, as those decisions stood at the time when these bonds were issued, an ENROLLED STATUTE passed by the legislative assembly was conclusive, and a person consulting the laws of the state was not bound to examine the journals of the legislature and ascertain at his peril whether such acts had been passed in the manner prescribed by the constitution, and therefore the amendatory act of February 20th, 1879, printed in the record, page 29, signed by the proper officers, duly enrolled and published in the statutes was a valid act, and this act also, as well as the ordinance of 1868, gave lawful author-

ity to issue the bonds in question in the present case.

In *Brodnax vs. Groom*, 64 N. C., 244 (1870), the question came before the Supreme Court of the State of North Carolina whether the courts could go back of the enrolled act of the legislature and examine whether or not it had been properly passed by the legislature. It was objected (p. 245) that the said act was private, and was passed without the thirty days' notice of application required by the constitution, Article II., section 12. On this point the court (PEARSON, C. J., giving the opinion) said (p. 247) :

" We do not think it necessary to enter into the question whether this is a *public local* act or a mere *private* act, in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of opinion that the ratification certified by the lieutenant-governor and the speaker of the house of representatives makes it a 'matter of record' which cannot be impeached before the courts in a collateral way. Lord COKE says : 'A record until reversed importeth verity.'

" There can be no doubt that acts of the legislature, like judgments of courts, are matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim that '*omnia presumuntur*,' etc. Suppose an act of congress is returned by the president, with his objections, and the vice-president and the speaker of the house certified that it passed afterwards by the constitutional majority; is it open for the courts to go behind the record and hear proof to the contrary?"

In the case of *Gatlin vs. The Town of Tarboro*, 78 N. C., 119 (1878), the payment of a tax levied by the town of Tarboro was resisted on the ground (p. 120), that " the act is private, and having been passed without any notice of the application, as required by the

Constitution, Art. II., § 12, it is therefore void." The fact that no notice was given, such as the constitution requires, was admitted by the parties in their agreed case, but did not otherwise appear. On this point the court said (p. 123):

"*As to the second point*, if it appeared from the act itself, or affirmatively appeared by the journals of the legislature, which would have been competent evidence that the notice of the intended application for the act which the constitution requires had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the legislature had obeyed the constitution, and that it appeared to it that the notice had been given. '*Omnia præsumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given as proof that it did not appear to the legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel vs. Brethaner*, 70 Ill., 166.

"If any weight were allowed to admissions of this sort, the law might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one."

The court therefore held the act good, notwithstanding the admission of the parties. What the court said it would "probably" hold in regard to the journals was clearly hypothetical and *obiter*, as no such question was presented before the court. This is called a *dictum* and expressly overruled in *Scarborough vs. Robinson*, *infra*, as being contrary to *Brodnax vs. Groom*.

In *Scarborough vs. Robinson*, 81 N. C., 409 (1879), the action was one of mandamus to compel the presid-

ing officers of the two branches of the legislative assembly to affix their signatures to an act of legislation which was shown by the journals to have been properly passed, but which had not been signed by such officers during the legislative session. The court held that the relator was not entitled to the mandamus, and that the action must be dismissed. In the course of the opinion the court said (p. 415) :

"The argument before us was mainly directed to the question whether an act of the general assembly clothed with the prescribed forms of law and placed in the keeping of the proper depositary, as such, can be impeached and its operation avoided by evidence derived from the journals or from other extraneous sources, that the directions of the constitution were disregarded or not observed in its progress and passage through the two houses ; and if this can be done, as a corollary or consequence, if the examination shows that all constitutional provisions have been strictly pursued up to and including the announcement of ratification, will not the court interpose and require the presiding officers to perform the omitted and mere ministerial act of authenticating the enactment with their signatures, and thus perfect in form what is already effective in substance.

"The discussion of the primary question upon the solution of which the other is supposed to be dependent, has been full, able and exhaustive ; and the numerous cases decided in the courts of different states before which the point was presented, brought to our attention through the industry and research of counsel, are by no means harmonious and consistent. If it were necessary in determining the present application to pass upon the competency of such impeaching evidence, we should be reluctant to assent to a proposition which leaves the existence and validity of a statute to depend upon the uncertain results of an inquiry made in each particular case, whether the provisions of the constitution directing the mode of legislative proceedings have been followed in the action of the two houses in passing a bill through its different stages of progress, when by the very act of authentication they declare that all these provisions have been

observed. If such an inquiry may be entered on (and it must be collaterally if at all, since there is no direct method of assailing and annulling a statute upon that ground) no lapse of time, no continuous and indefinite recognition of its force and acquiescence in its operation, and no non-interference by succeeding legislatures, would bar the inquiry or give stability and repose to the law itself; consequences so serious and far reaching cannot be hazarded except upon the clearest convictions of the soundness of the principle from which they flow, and the competency and duty of the court so to delare.

"In most of the cases to which we have been referred in which the competency of such evidence is maintained, the court pressed by the force of the objection avoid the consequences of its admission by holding that the requirements and restraints put upon the mode of legislative action, are only directory, and if disregarded do not affect the validity of the act done. This is but another method of reaching the same result. For why should an inquiry be prosecuted to ascertain a fact, which if disclosed by the journals is to have no effect?

"The distinction between the cases in which the judicial power will declare an act of the legislature void, and in which it will not, is forcibly pointed out in the case of the *Pacific R. R. Co. vs. Governor*, 23 Mo. (2 Jones), 353, by SCOTT, J., thus: 'While the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such power is claimed and exercised in relation laws which on their face show that the constitutional limits have been transcended.' * * * 'If the legislature exceeds its powers in the enactment of a law, the courts being sworn to support the constitution, must judge that law by the standard of the constitution and declare its validity. But the question whether a law on its face violates the constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case a power is exercised not delegated or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other the law is not in its terms contrary to the constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the

general assembly in making the law was governed by the rules prescribed for its action by the constitution.'

"The question is thoroughly investigated and discussed in *Pangborn vs. Young*, 32 N. J. Law Rep., 29, which is followed by the supreme court of Nevada in *Nevada vs. Swift*, 10 Nev., 176, and all the authorities collected and reviewed. The Chief Justice thus announces the conclusion of the court in the former case: 'My general conclusion then is, that both upon the grounds of public policy and upon the ancient and well settled rules of law, the copy of a bill attested in the manner above mentioned and filed in the office of the secretary of state, is the *conclusive proof* of the enactment and contents of a statute of this state and that such attested copy cannot be '*contradicted by the legislative journals or in any other manner.*' And ELMER, J., concurring says: 'I am clearly of the opinion that we cannot look behind the law as it is signed and deposited among the public archives. It has thus become a record which cannot be contradicted.' The supreme court of Nevada, after a full examination of cases on each side of the question, sum up the result in the following words: 'From this discussion it appears that the decided weight of authority as well as every consideration of expediency is opposed to the doctrine that this or any court, for the purpose of informing itself of the existence or terms of a law, can look behind the enrolled act, certified by those officers who are charged by the constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted.'

"If such force and effect are given to an enrolled bill bearing the impress of legislative sanction, and with the prescribed authentication of its proper officers deposited for safe keeping as prescribed by law, this authentication must be by the authority of the legislature itself, which can neither be coerced nor controlled by the judicial power.

The Court then proceeds to consider the Constitutional requirements in the passage of laws—the nature of an enrolled bill—defines what the "ratification" of a legislative act is, and the purpose and effect of the Art. 2, Sec. 23, requiring "all bills, before the

passage into laws, to be read three times and signed by the presiding officers of both houses":

"But the determination of the question is not necessary to a decision of the present application. In our opinion the signatures of the presiding officers of the two houses under and by force of the words used in our constitution are an essential prerequisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the general assembly.

"**An enrolled bill is not that considered and adopted by the concurring action of the two houses, but is a substituted copy transcribed to take the place of the original, and becomes the final expression of the legislative will. Its accuracy is secured by the examination, comparison and report of a committee in each house, and when each house ratifies that it accepts and adopts the enrolled bill as the embodiment of its own action and the correct expression of its will. Ratification is the act of the house, and its presiding officer in attesting the same acts on behalf of and by its authority. This is a necessary safeguard against fraud in the insertion of new matter, or the omission or change of existing provisions in the bill, not to be lost sight of or surrendered. Each body gives its direct and positive sanction to the enrolled bill, as its act, when its presiding officer signs, and he is but its agent acting in its stead when he does so. In other words, this is the consummation of legislative action, which is incomplete and inoperative without it. But the constitution in express terms makes the attestation imperative and essential. It declares 'that all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses'** (Art. II., Sec. 23). * * *

"Our attention was called to the argument of plaintiff's counsel to an expression found in the opinion in *Gatlin vs. Tarboro*, 78 N. C., 119, in which RODMAN, J.,

says: 'If it appeared from the act itself or affirmatively appeared from the journals of the legislature, which would have been competent evidence, that notice of the intended application for the act *(private)*, which the constitution requires, had not been given, *we should probably hold the act void.*' Yet in this very case it was admitted that no such notice had been given, and hence there could be no issue and no controversy about the fact, and the admission was held insufficient to warrant the court in declaring the act void for the defect. The remark of the able judge was a *dictum* merely, in no manner necessary in the determination of the cause; and, if not an inadvertence, is clearly repugnant to what is declared by the Chief-Justice in *Brodnax vs. Groom*, 64 N. C., 244: 'We do not think it necessary,' say the court, 'to enter into the question whether this is a local public act or a mere private act, in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of opinion that the *ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way.*' Lord COKE says 'a record until reversed importeth verity.'

"The constitution declares that the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other (Art. I., Sec. 8). And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the 'separate and distinct' co-ordinate departments of the government, and must consequently be denied."

In *State vs. Patterson*, 98 N. C., 660 (1887), it was held that a statute *without an enacting clause* prescribed by the constitution, Article II., Section 21, is void. The court cites *Scarborough vs. Robinson*, 81 N. C., 409, as holding that a bill without the signatures of the presiding officers of the two branches of the general assembly is void.

It seems perfectly clear that any lawyer reading these decisions of the Supreme Court of North Carolina, and the cases and authorities cited in such decisions, would come to the conclusion that the Supreme Court of North Carolina had established the rule that the enrolled act of the legislature, ratified by the legislature, properly signed by the presiding officers of the two branches of the legislature, is conclusive, and that it cannot be impeached by examining the journals, or in any other way.

This is the view taken by this Court in *Field vs. Clark*, 143 U. S., 649, 677, where this Court, after reviewing the cases which hold that the enrolled act is conclusive, says : **" To the same general effect are :** *Brodnax vs. Commissioners, 64 Nor. Car., 244, 248.*" * * *

This is also stated in the attorney-General's note to *Field vs. Clark*, 143 U. S., 649, 665, as follows :

" North Carolina.—In North Carolina it is held that the enrolled act is conclusive *(Brodnax vs. Groom*, 64 N. C., 344 ; *State ex rel. Scarborough vs. Robinson*, 81 N. C., 409*).*"

In *Ex parte Wren*, 63 Miss., 512 (1886), the Supreme Court of Mississippi, referring to the rule in North Carolina, says :

(p. 529 :) " A third view is that the enrolled act, signed by the president of the Senate and the speaker of the House of Representatives and the Governor, is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions."

(p. 532 :) " The third view mentioned above meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest

assent. Every other view subordinates the legislature and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation and multiplying a hundredfold the alleged uncertainty of the law."

(p. 533 :) "**The rule which we announce as the correct one is supported by** * * * *Brodnax vs. Groom*, 64 N. C., 244."

Furthermore, that this understanding of these decisions of the Supreme Court of North Carolina, above quoted, is correct, appears, we submit, in the case of *Carr vs. Coke*, 116 N. C., 223 (February Term, 1899). Although this decision in *Carr vs. Coke* was rendered after the bonds in question in the present case were issued, yet it is competent to refer to that decision to show what the Supreme Court of North Carolina understood had been decided in the cases of *Brodnax vs. Groom* and other cases above cited, before the bonds in the present case were issued.

FAIRCLOTH, C. J., states the case as follows (p. 232) :

"The plaintiff, as a citizen and taxpayer of the State, brings this action against the defendant as Secretary of State, who, by virtue of his office, is the custodian of all Acts passed by the Legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said Acts to the Public Printer for publication. The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act under consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the Public Printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified March 13, 1895, is the one under consideration.

"The complaint alleges that the Act was signed by the President of the Senate and the Speaker of the House of Representatives on the said 13th of March in

the presence of each House, and purports to have been ratified upon that day; that, upon information and belief, the act did not become law according to the Constitution of the State. That the journals of both Houses show that it was not read three times in either; that it was never read in the Senate, and was tabled in the House on its second reading, and that by some unknown fraudulent means the bill was enrolled by some person unknown to the plaintiff, and signed by the said President and Speaker by mistake."

The court, in *Carr vs. Coke*, quoted the case of *Brodnax vs. Groom*, 64 N. C., 244, to the effect that (p. 235):

"We are of opinion that the ratification certified by the Lieut.-Governor and the Speaker of the House of Representatives makes it a 'matter of record,' which cannot be impeached before the Courts in a collateral way. Lord COKE says: 'A record until reversed importeth verity.' There can be no doubt that acts of the Legislature, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim, '*Omnia presumuntur*,' &c. Suppose an Act of Congress is returned by the President with his objection, and the Vice-President and Speaker of the House certify that it passed afterwards by the Constitutional majority, is it open for the Courts to go behind the record and hear proof to the contrary?"

The court also said:

"In *Scarborough vs. Robinson*, 81 N. C., 409, in which this question was not directly before the Court, SMITH, C. J., in the discussion, uses this language on page 426: 'The Constitution declares that the legislative, executive and Supreme Judicial powers of the government ought to be forever separate and distinct from each other (Art. I., Sec. 8). And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the separate

and distinct co-ordinate departments of the government, and must consequently be denied.' *We quote this extract in order to show the trend of the judicial mind of the Court as then constituted.*"

"The trend of the judicial mind of the Court as then constituted," as shown in *Brodnax vs. Groom* and in *Scarborough vs. Robinson*, would lead any lawyer to say that the court had expressly decided the legal proposition that covers this case—namely, that the enrolled act is conclusive.

The court, after considering the question, held, in *Carr vs. Coke*, as stated in the head-note of that case (p. 223):

"The courts cannot go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had been passed, after the requisite readings by each house, although the journals do not show that it was so passed."

Note the ground upon which the Supreme Court of North Carolina decided, in the case of *Brodnax vs. Groom*, that the enrolled act was conclusive. The court did not rest its decision upon any such narrow ground as that the journals of the legislature or other matter besides the enrolled act might be examined for some purposes, but not for others, but the court rested its decision upon the broad, solid and comprehensive ground that the enrolled act, properly signed by the presiding officers of the legislative body was a matter of record which could not be impeached before the courts by reference to the journals of the legislature, or in any other way. That decision covers the Act of February 20, 1879, in question in the present case.

Re the Sufficiency of the Passage of the Amendatory Act of February 20, 1879.

The act of February 20th, 1879 (Record, p. 29) was read as shown by the Journals as prescribed by Sec. 2, Art. 14, of the constitution three several times in each House on three different days and the yeas and nays entered on the third reading in the House and on the second and third reading in the Senate, the Journal being silent as to the yeas and nays on the second reading in the House. This silence is the only alleged defect in the passage of this Act. And note that Sec. 5 enacts "This Act shall be in force from and after its ratification." Then follows these words: "Read three times in the General Assembly and ratified the 20th day of February, 1879."

This act thus read and ratified was thereupon signed in open session by the presiding officers of both Houses as required by Art. 2, Sec. 23 of the Constitution. Now, recalling the solemn nature of a ratification as described by the Supreme Court of North Carolina in *Scarborough vs. Robinson*, (quoted *supra*, p. 69), and that this is the express act of the legislative body giving its sanction to the enrolled bill thus ratified and signed; that such signing "is the consummation of legislative action" and a solemn record of it; that this act was put into immediate force on February 20, 1879; that it declares on its face that it was "read three times in the General Assembly" and then ratified; that the legislative journals long aftewards published show only a single omission to record the yeas and nays on the second reading in the House; that the act was duly printed

in the session laws of the State—recalling this, what is to be said of the late doctrine of the Supreme Court of the State first promulgated in the *Oxford* case (119 N. C. R., 214, 1896), that this act and this solemn record is liable to be impeached by the unpublished Journal made up in the haste and hurry of business from notes, and which is nowhere declared to be a record?

Even when tested by the Journals, the act of February 20, 1879, was passed in the full compliance with Art. 2 Sec. 14, except the omission to record, probably by mistake, the yeas and nays on the second reading in the House. Under these circumstances the courts should presume *(as such presumption in no way contradicts the Journals)* that the yeas and nays were in fact taken and by mistake omitted to be entered on the journal. Under the special circumstances thus attending the passage of this Act of February 20, 1879, as above shown, we insist *that the mere silence of the Journals will not impeach the act, even if the Journals are in any event competent for that purpose.* And we respectfully ask the judgment of this Court on the soundness of the proposition just stated.

But we nevertheless insist that under the doctrine announced by the court in the case of *Brodnax vs. Groom* this act not only is not but cannot be impeached by anything that appears upon the journals of the legislative body. Any one who at the time these bonds were issued, in 1889, examined the decisions of the Supreme Court of North Carolina, especially its decision in the case of *Brodnax vs. Groom* and other cases cited *supra*, would have been justified in coming to the conclusion that this enrolled and officially published act of February 20th, 1879, was conclusive,

and that he was not bound to consult the journals of the legislature to see that all the details in the passage of the act had been complied with.

This is the broad and underlying proposition announced by the court, on which the decision was rested in the case of *Brodnax vs. Groom*. The Supreme Court of North Carolina, in the recent case of *Commissioners vs. Call*, 123 N. C., 308, and other cases cited in the first question certified (Record, p. 42), decided since the bonds in question in the present case were issued, has undertaken to distinguish this case of *Brodnax vs. Groom*, and to say that on the particular facts in that case the Supreme Court of North Carolina *might* have decided that case on a narrower ground. That, even if true, is immaterial. The fact is that the court in *Brodnax vs. Groom did* decide the case on the single proposition that the enrolled act is a record and is conclusive, and this proposition, or rule of construction of the constitution, is one on which the holders of these bonds have a right to rely. To say that this proposition may now, after these bonds have been issued, be overruled by a process of distinguishing the case and saying that the court might have decided it upon other grounds, cannot be permitted. In the language of Mr. Justice BROWN, in the case of *Wade vs. Travis County*, 174 U. S., 499, this (p. 509) "would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security." If a construction of the constitution thus established by the decision of a state court could be frittered away and pared down as has been attempted by the Supreme Court of North Carolina, then no one could rely upon the opinions delivered by the court

and printed in their official reports, but it would be necessary in every case to examine the record and the particular facts in the case at length and in detail, and to ascertain whether or not the court *might* not have put its decision on some other ground than that actually stated in its opinion.

A striking illustration of the rule of judicial precedent as imperatively extending to cases which are held to fall within the *principle* of a previous decision, though the facts are different, is furnished by the case of *Lahr vs. Metropolitan Elevated Railway Company*, 104 N. Y., 268 (1887). RUGER, C. J., delivering the opinion of the court, which on this point was unanimous, said:

"The doctrine of the *Story case*, 90 N. Y., 122, therefore, although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, and as establishing the law as well for this court as for the people of the state whenever similar questions may be litigated. Wherever, therefore, the principles of that case logically lead us we feel constrained to go and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses."

III.

But even if it be contended by the attorneys for the county that the Supreme Court of North Carolina had not decided at the time these bonds were issued that an enrolled statute, passed by the legislative as-

sembly, duly ratified and signed, was conclusive, and that it was not competent to show by the journals that the statute had not been enacted in the manner prescribed by the constitution, then certainly the Supreme Court of North Carolina had not then decided against such a proposition. All of its language certainly, if not the several decisions of the court, was in favor of such a proposition. If, for the sake of the argument, we assume that the precise point involved in the present case had not been decided by the Supreme Court of North Carolina at the time when the bonds in suit were issued, then it is open to the federal courts to consider as a new and original proposition the following, namely, that " at the time these bonds were issued, by any sound principle of construction, an enrolled statute passed by the legislative assembly of North Carolina was conclusive, and it was not competent to ascertain from the journals whether such statute had been passed in the manner prescribed by the constitution."

On the point that under such a state of decisions this question is open in the federal courts, we need only refer to the leading case of *Burgess vs. Seligman*, 107 U. S., 20, quoted in *Folsom vs. Ninety-Six*, 159 U. S., 625 :

" So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, *or when there has been no decision of the state tribunals*, the Federal courts

properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

Assuming, then, that the question is open for consideration in this Court as an original question, we maintain that, on sound principles of construction of the North Carolina constitution, an enrolled statute passed by the legislative assembly, ratified by it and duly signed by the presiding officers of each house, is conclusive and cannot be impeached by what appears, or does not appear, upon the journals of the legislature. On this proposition we cite the case of *Field vs. Clark*, 143 U. S., 649. The Court says (p. 672):

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated

in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

"It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is that it cannot be regarded as a law of the United States if the journal or either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy, to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

"The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn vs. Young*, 32 N. J. Law (3 Vroom) 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the governor. The bill there in question, it was alleged, originated in the house and was amended in the Senate, but, as presented to and approved by

the governor, did not contain all the amendments made in the Senate."

The grounds and reasons of the rule that the Journals cannot control the enrolled record are thus forcibly stated by this Court:

"Referring to the provision in the constitution of New Jersey requiring each house of the legislature to keep a journal of its proceedings, which provision is in almost the same words as the above clause quoted from the Federal Constitution, the Court, speaking by Chief-Justice BEASLEY, said that it was impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. The Chief-Justice said: 'Can any one deny that, if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation?"

What has happened in North Carolina since the decision was made in that State that the enrolled and published acts could be impeached by the Journals is proof of the correctness of the statement that the stability of all enrolled and published acts has been shaken to its very foundations. This Court then continues:

"Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. * * * In addition to these considerations, in judging of consequences, we are to remember the danger

under the prevalence of such a doctrine to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the state legislation to the hazards of such probable error or facile fraud. The doctrine contended for on the part of the evidence has no foundation, in my estimation, on any considerations of public policy.' The conclusion was, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. These principles were affirmed by the New Jersey Court of Errors and Appeals in *Freeholders of Passaic vs. Stephenson*, 46 N. J. Law (17 Vroom), 173, 184, and in *Standard Underground Co. vs. Attorney-General*, 46 N. J. Eq. (1 Dickinson), 270, 276."

After citing other like decisions, this Court, in *Field vs. Clark*, *supra*, says (p. 677): "To the same general effect are *Brodnax vs. Commissioners*, 64 Nor. Car., 244, 248;" also citing other cases.

It seems impossible that on sound principles a court can arrive at any other conclusion than that the enrolled act is conclusive and cannot be impeached by the journals. As is stated in *Field vs. Clark*, quoted *supra*, these journals are kept by a subordinate officer. They are frequently made up of loose memoranda. They are not declared to be records. While they are printed after the legislative session, they are not in general circulation. It is not the common practice of lawyers to consult the journals of the legislature whenever they examine legislation. On

the contrary, it is the common practice of lawyers and of the courts, from time immemorial, to consult only the officially published statutes and the enrolled act.

The reasoning of the Court in the case of *ex parte Wren*, 63 Miss., 512 (1886), is so sound and conclusive upon the point here presented that we quote the following from its opinion:

(p. 529:) "A third view is that the enrolled act, signed by the president of the senate and the speaker of the House of Representatives and the Governor, is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions."

(p. 532:) "The third view mentioned above meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest assent. Every other view *subordinates* the legislature and disregards that coequal position in our system of the three departments of government."

The impractibility of the *present* North Carolina doctrine and the evils that result from it are thus depicted, and the woeful experience in North Carolina shows that the picture drawn by the Mississippi Court is not in the least overcolored. The Court thus continues:

"If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law. Every suit before every court where the validity of a statute may be called in question as affecting the right of a litigant will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must

be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law is to be declared by the court. It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace and statutes delared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court will, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested. It is difficult enough often to say what an admitted statute means, and while we would not shrink from the investigation of all questions of fact on the existence of which any statute depends, we decline to review the legislative records to try the regularity of its action as to the manner of exercising its constitutional authority to enact laws, over which its power is as plenary as that of this court as to the manner in which it shall exercise its jurisdiction.

"The rule which we announce as the correct one is supported by Sherman vs. Story, 30 California, 253; People vs. Burt, 43 California, 560; Evans vs. Browne, 30 Indiana, 514; Koehler vs. Hill, 60 Iowa, 543; Company vs. Richoux, 23 La. An., 743; Mayor vs. Harwood, 32 Md., 471; Railroad Co. vs. Governor, 23 Mo., 353; Swann vs. Buck, 40 Miss., 268; State vs. Swift, 10 Nevada, 176; Pangborn vs. Young, 32 N. J. Law, 29; People vs. Devlin, 33 N. Y., 269; **Brodnax vs. Groom,** 64 N. C., 244.

"There are other cases supporting the opposite views, but we have cited the most important on both sides.

"The English rule is conceded to be that for which we contend."

The rational and solid foundation of the rule that

the Journals cannot impeach the enrolled act duly signed and authenticated unless the Constitution so says in terms *(and the North Carolina Constitution does not)* is thus expounded in the most able opinion of the Supreme Court of Mississippi :

" The fundamental error of any view which permits an appeal to the journals to see if the constitution has been observed in the passage by both houses of their enactments, is the assumed right of the judicial department to revise and supervise the legislature as to the manner of its performance of its appointed constitutional functions. It is the admitted province of the courts to judge and declare if an act of the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it. The legislature is one of the three co-ordinate and coequal departments into which the powers of government are divided by the constitution, possessing all legislative power and not subject to supervision and control during its performance of its constitutional functions, nor to judicial revision afterward of the manner in which it obeyed the constitution its members are sworn to support. From necessity the judicial department must judge of the conformity of legislative acts to the constitution, but what are legislative acts must be determined by what are authenticated as such according to the constitution.

" That instrument contains many provisions as to the passage of bills which are admitted to be addressed to legislators exclusively, and for non-observance of which there is confessedly no remedy which courts can apply. Why should a distinction be drawn between the different provisions of the constitution, and some be held *mandatory* and others *directory?* There is no reason for such a distinction, and it is the off-spring of a necessity born of the error of regarding any of the provisions of the constitution addressed to and obligatory on the legislature as enforceable by the courts as supervisors of the legislature. The sound view and that which avoids the inconsistency of the distinction mentioned, is to regard all of the provisions of the constitution as mandatory, and those regulating the legislative department as addressed to and mandatory to that body, and with which the courts have nothing to

do in the way of revision of how the legislature has performed its duty in the matters confided exclusively to it by the constitution."

So the provisions of Art. 2, Sec. 14, show that they are rules of *procedure* addressed to the Legislative Department to be observed by that Department, and there is no declaration in that section or elsewhere that if they are not observed and their observance made to appear on the Journals the Act though ratified, signed, enrolled and officially published shall be void.

The Mississippi Court thus proceeds :

"Let the courts accept as statutes, duly enacted, such bills as are delivered by the legislature as their acts authenticated as such in the prescribed mode.

"The language of the constitution, Sec. 23, art. iv., is: 'Bills may originate in either house, * * * and every bill shall be read on three different days in each house, unless, etc., * * * and every bill, having passed both houses, shall be signed by the president of the senate and the speaker of the house of representatives in open session.'

"'SECTION 24. Every bill which has passed both houses shall be presented to the governor of the State.' Is it not manifest that the requirement that the bills which have passed both houses shall be signed by their presiding officers, in open session, was designed as an official attestation of the fact of such passage, and a solemn and unimpeachable authentication of the bills passed by both houses, an assurance of their identity and of the fact that they had been passed by both houses, in the manner required by the constitution? Thus attested, every bill is to be presented to the governor. Must he search the journals to guard against a disregard by the legislature of the constitution as to the manner of legislating, and to avoid giving approval to an act passed without a due observance by the legislature of its provisions?

"Is every person on whom the law operates to look beyond the enrolled act duly signed as required by the constitution, to see if the journal nullifies what appears by the act thus attested? The proposition is monstrous, and the recognition of such a doctrine is full of mischief, without any compensating advantage.

But, it is said, the courts are guardians of the constitution and if they do not look into the history of legislative doings that department may disregard the constitution as to the manner of passing laws. True, the courts are guardians of the constitution in the performance of their duty to decide causes, and should not shrink from declaring an act of the legislature enacted precisely in the mode prescribed by the constitution void if its provisions violate it; and, on the other hand, the courts should not arrogate the unconstitutional prerogative of reviewing and revising the course of legislative procedure in passing bills in the exercise of its clearly conferred right to pass them by virtue of an instrument containing injunctions binding on it, and sought to be enforced by the oath required of members, and not committed to the courts."

Numerous other authorities might be cited and quoted from to the same effect.

In short the enrolled bill, duly ratified in open session and "*signed by the presiding officers* of both Houses," as required by the Constitution of the State (Art. 2, Sec. 23) is the *record* prescribed by the Constitution itself and not the unattested Journals.

The decision of the Supreme Court of North Carolina, in the case of Gatlin vs. Tarboro, 78 N. C., 119 (rendered before these bonds were issued), that it would not take judicial notice of the journals of the legislature, is utterly inconsistent with any proposition that an enrolled act can be impeached by such journals.

Under familiar principles of common law the court is bound to take judicial notice of the law. Certainly a state court is bound to take judicial notice of the laws of the state. When, therefore, a state statute is before a state court, the court must, in the very nature of things, take judicial notice of whether that statute is

the law or not. If, in order to know whether that statute is the law, it is necessary to find upon the journals of the legislative body certain entries, and if without such entries the statute is no law, then by all the fundamental principles of law and logic the court must take judicial notice of all that appears upon the journals of the legislative body. The Supreme Court of North Carolina, however, in the case of *Gatlin vs. Tarboro*, 78 N. C., 119, expressly held that it would not take notice of such journals. This holding is wholly irreconcilable with the proposition that in order to know whether a statute is law one must consult the legislative journals.

The Supreme Court of the State of North Carolina, down to this present time, still holds that it will not take judicial notice of the legislative journals (*Union Bank vs. Commissioners of Oxford*, 116 N. C., 339, and 119 N. C., 214).

In other words, we have here presented this utterly inconsistent proposition now advanced by the Supreme Court of North Carolina, namely, that any person purchasing bonds issued by counties or other municipalities in the State of North Carolina must take notice of the law. In order to know what the law is, such person must consult the journals of the legislative bodies and see whether the duly enrolled and officially published laws have been passed in the precise manner prescribed to the legislature as a mode of procedure by the constitution. But when a case comes up in the courts of North Carolina, and it is necessary to determine what the law is, the courts themselves will take judicial notice only of the enrolled act, or the act as printed in the authorized published laws of the state.

Those courts will not take judicial notice of the journals, but they must be the subject of proof.

The earlier decisions, beginning with *Brodnax vs. Groom*, 64 N. C., 244, etc., all proceeded upon the correct doctrine, namely, that the enrolled act is the prescribed record, and the only record which either courts or individuals are obliged to consult, and the only thing of which they have constructive notice. The decisions of the Supreme Court of North Carolina rendered after these bonds were issued are to the effect that individuals must take notice of the journals, they being *a matter of law*, not a matter of fact, but with curious inconsistency they hold that the courts need not take judicial notice of these journals, but that they must be proved as other matters of fact, although the question before the court is, What is the law of the state—of which, on general and necessary principles, all courts are bound to take judicial notice without any proof whatever. Thus have the North Carolina courts departed from the early and the correct doctrine, but they have not been willing to adopt their new doctrine with its logical and necessary consequences, which would force the courts themselves and the judges of the courts, in every case tried by them involving the examination of a statute, to examine the journals of the legislative body to see whether the statute was properly passed.

Another way of putting the case is this: You, a purchaser of a negotiable municipal bond in the city of Washington, or New York, or Philadelphia, in examining that bond, are bound to examine not merely the statute under which the bond is issued, but you are bound to examine the legislative journals to see whether that statute was properly passed, because the

journals are part of the law, of which any one has constructive notice, but the North Carolina courts themselves will not pay any attention to the journals unless they are proved as a matter of evidence.

IV.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000 (Record, p. 28). These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

These sections of the Code are quoted at large in the Record on page 28.

Our first proposition under these sections of the Code is that they are prospective in their operation, and that they are not limited to any railroad which had been begun either before the constitution of 1868 was adopted or before the adoption of these sections of the Code by the act of April 10, 1869.

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any

railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code. Any of the recent decisions of the Supreme Court of North Carolina to the contrary are wholly indefensible, and have no support in the language of these sections of the code. Inasmuch as all of these decisions were rendered after these bonds were issued, they are not binding upon the federal courts (See *Folsom vs. Ninety-Six*, 159 U. S., 61, *supra*).

These sections of the Code required an election and a vote of a majority of the qualified voters of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds. The bond (Record, p. 24) recites it. The complaint (Record, p. 6, paragraph 22) alleges compliance, and the answer of the county commissioners (Record, p. 15, paragraph 24) also admits compliance with this provision of the code.

The recital in the bond is that the bond is "authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1888." We are aware of the fact which has been heretofore referred to in this brief, (*ante*, pp. 35–38) that the said bonds recite that they are issued by authority of the act of February

20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See *Anderson County vs. Beal*, 113 U. S., 227, where the wrong act was recited. In that case this Court, notwithstanding the bonds recite the wrong act, held, as respects the recital of the election, as follows, to wit (p. 239):

"In view of all this, the statement by the commissioners in the bond that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes county bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Section 6 and 7, Article 5, of the Constitution are as follows:

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

It was objected by the state court in the case of *Commissioners vs. Call, supra*, and in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, p. 323, that these provisions of the Code are a general act, and as such violate Article V., Section 6 and 7, of the constitution, which provides, in substance, that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the state tax, and shall never exceed the double of the state taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for these bonds would exceed double the state tax; therefore, the question does not arise.

(b) If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the state tax, then these bonds are, nevertheless, valid:

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the legislature give special approval to the special purpose for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the legislature to the special purpose. If the rate referred

to in Article V., Section 6, is to exceed the double of the state tax, this section requires the legislature to specify the special purpose for which it may so exceed the state tax. The legislature could not authorize such excess by an act, general or special, which only named county purposes generally, and did not specify the special or particular purpose, but it is not necessary that the legislature should in each instance specify by name any particular county or counties. The specification required is only a specification for a special purpose. Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a special purpose within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the state, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution, referred to, contemplates that such taxes may be levied by all " the several counties " of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the tax and the purpose have the special approval of the General Assembly.

The proposition of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state ; that is, say, ninety-five acts, each act exactly alike, except that one act applies to one county and

another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

But, Second, however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore, on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled. See *United States vs. Macon County*, 99 U. S., 582. Article V., Section 6 of the constitution of North Carolina is a mere limitation upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited.

Furthermore, Third, even if there be this tax-rate limit in Article V., Section 6 of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a

fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice. Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

Erroneous Construction of the Word "Completion" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case.* 121 N. C., 394. 1899.

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the code might have application. This interpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution as respects the issue of state railroad aid bonds. Article V., Section 4, of the constitution prohibits the issue of State railroad aid bonds, "except to aid in the

completion of such railroads as may be *unfinished at the time of the adoption of this constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words—namely, " unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there.

Erroneous Construction in the *Stanly County Case* by the State Supreme Court of the Words " any Railroad in which the CITIZENS OF THE COUNTY MAY HAVE AN INTEREST," see said Section 1996 of the Code.

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, " the citizens of the county may have an interest," do not mean exactly what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construction by the Supreme Court of North Carolina takes out the words " *the citizens* " and inserts the word " *pecuniary*," and thus it holds that the words " any railroad in which the citizens of the county may have an interest " are to be construed as follows, to wit : " Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the code is enough to refute any such construction. Here, too, again we may call the attention of this Court to the language of Article V., Section 6, of the constitution of the state of

North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad " in which the State has a *direct pecuniary interest.*" This section 1996 of the Code was adopted about one year after the said Article V., Section 6, of the constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996-2000).

What is now Section 5 of Article V. of the constitution was originally reported to the Constitutional Convention of 1868 by the committee on finance as follows:

" Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually " (Journal, p. 354).

An amendment was proposed as follows:

" And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvement as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon " (Journal, p. 354).

This proposed amendment was further amended as follows:

"Mr. Tourgee moved to amend by striking out 'are' in the fifth line and inserting 'may be;' insert after the word 'unfinished' in the fifth line '*at the time of the adoption of this constitution.*' Strike out 'and' in the fifth line and insert 'or.'" This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the President of the convention as follows:

"SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a 'statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and what amount of dividend or interest she receives annually from each source.'" * * *

The report of the Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 5, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c.,

already begun. *With a vote of the people* the State was allowed to aid railroads without restriction. As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996–2000 of the Code).

This view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the court say, with respect to the restrictions on the power of the state to incur debt, speaking of the debt existing at the time of the adoption of the constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to say eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item, and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

" * * * (p. 155). The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and indeed it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution as to State aid bonds and the language of the Code as to county aid bonds. The Constitution says "*has*," and note the comments of the court on the present tense. The Code says "*may have*," &c., &c.

Of course such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of sections 1996–2000 according to their natural and proper meaning.

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running into or through the county, and this section would be confined accordingly to *such* railroads.

Our second proposition as to the Code is that even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sections are not prospective in their operation, they, nevertheless, authorize the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.

There cannot be the slightest foundation in this language of section 1996 of the code for saying that it applies only to the completion of a railroad which had been begun *when the constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869. Even if this earlier date, April 10, 18 9, be the one selected, then it is, nevertheless, true that these sections of the code would apply to and authorize these Wilkes county bonds, since this railroad might be a railroad referred to in these sections, and the sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad. This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868 (Record, p. 24), over one year before the passage of these code sections. Section 1 of the Ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this. The line into Wilkes County was not a *branch* as erroneously contended in the brief of Judge AVERY (pp.

33, 34). Forsyth county, as shown in the two Forsyth county cases above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June term, 1868, of the board of commissioners of Forsyth county. This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the code, April 10, 1869 (SEE MR. PRICE, BRIEF, p. 53, *for further facts and dates*). Obviously, therefore, these sections of the code apply to this issue of bonds by Wilkes county to aid " in the completion " of such railroad.

The County is Estopped by the Recital in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds ;* and whether or not all of the facts existed, such as that the railroad had been begun and was unfinished at the time of the adoption of this act, April 10, 1869, is a matter *in pais* to be determined by the county commissioners before the bonds are issued; and inasmuch as they have issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed.

Second and Third Questions Certified by the Court.

The second and third questions certified by the Court are as follows (Record, p. 43):

"SECOND. Whether, if the bonds and coupons in question were issued, put in circulation and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"THIRD. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity."

Our argument, *supra*, under the first question certified by the Court, is equally applicable to the second and third questions certified, and we do not here repeat such argument at length, but respectfully refer the Court to the same. This argument shows conclusively that the *second* question ought to be answered in the affirmative; namely, that the bonds held by the complainants, *bona fide* holders thereof, are valid bonds.

Such argument also shows that the *third* question propounded should be answered by holding that there was no decision adverse to the validity of these bonds, but that there were decisions in favor of their validity.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for W. N. Coler & Company.

APPENDIX.

Quoting or referring to provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina to be considered in connection with this case.

1.

The following are provisions of the *Constitution* of North Carolina (See Code of North Carolina, 1883, Volume 2):

"ACTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

* * * * * *

SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

* * * * * *

"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

* * * * * *

SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

* * * * * *

SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

* * * * * *

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

* * * * * *

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. " The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. " Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* * * * * *

SECTION 7. " No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

2.

Ordinance of Constitutional Convention, passed March 9, 1868, printed in full in Record, page 24.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive (being the act referred to in Section 12 of the said ordinance of March 9, 1868), printed in full in Record, page 31.

4.

Act of August 11, 1868, printed in full in Record, page 27.

(ART. VII.) SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

5.

Act of February 20, 1879, printed in full in Record, page 29.

6.

Act of March 2, 1881, printed in full in Record, page 30.

7.

Code, sections 1996 to 2000, printed in full in Record, page 28.

Code sections 1996 to 2000 were originally the act of April 10, 1869, the title of which was, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.

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JAMES H. McKENNEY,
Clerk.

No. 167.

No. 167 19398

Opp'r to Pet'n. of Dillon and others for Certiorari.

[The following is a full and exact report of the case of *Wilkes County vs. Call*, in the Supreme Court of the State of North Carolina, reprinted from the official report, 123 N. C., 308.]

Filed Oct. 15, 1900.

Commissioners of Wilkes County v. Clarence Call, Sheriff and ex officio Treasurer of Wilkes County, et als.

(Decided November 9, 1898.)
[123 North Carolina Reports, p. 308.]

COUNTY BONDS—RAILROAD STOCK—INVALIDITY—ESTOPPEL.

1. Legislation authorizing the creation of county indebtedness must conform to constitutional requirements.
2. A county bond stating on its face the Act under which it is issued is notice to the holder, and estops him from controverting the statement.

Civil action pending in Wilkes Superior Court and heard, by consent, before STARBUCK, *J.*, at Winston, upon a motion by defendants to vacate the restraining order, heretofore granted, until the final hearing.

The prayer of the complaint was to enjoin the defendant, County Treasurer of Wilkes, from paying the coupons on county bonds issued in aid of the Northwestern North Carolina Railroad Company on the ground that the bonds in controversy were issued by the Boad of Commissioners of Wilkes county, without lawful authority so to do, and are invalid and void.

His Honor refused the motion to vacate the restraining order, and defendants excepted and appealed.

The statement of the case fully appears in the opinion of the Court, and in the dissenting opinions.

Mr. A. C. Avery, for plaintiffs.

No counsel *contra*.

DOUGLAS, J.: This is an action brought to test the validity of certain bonds issued by Wilkes county in

payment of its subscription to the stock of the Northwestern North Carolina Railroad Company. The suit was brought by the Commissioners of the County of Wilkes against the County Treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant, and invited all other bondholders to come in and join them in resisting the action.

In the face of each bond, dated October 1, 1889, appears the explicit statement that: "This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an Act of the General Assembly of North Carolina, ratified the 20th day of February, A. D., 1879, entitled: 'An Act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell county'," etc. The bond does not allude in any way to any other legislative act, nor does it profess to claim further validity than that derived from the recited act.

It is admitted, as well as clearly shown by the evidence, that this Act of February 20, 1879, was not passed in accordance with the mandatory provisions of the Constitution of this State, as construed by this Court inasmuch as upon the passage of said bill upon its second reading in the House of Representatives, there was no call of the ayes and noes, and further that the vote upon such reading was not recorded in the Journal of the House. Constitution, Article II, Section 14. The amendatory Act of 1881 is subject to the same objection. In view of the recent decisions of this Court it is useless to discuss this question now, as the rule has been definitely settled in the following cases: *Bank* v. *Commissioners of Oxford*, 119 N. C., 214; *Commissioners* v. *Snuggs*, 121 N. C., 394; *Charlotte* v. *Shepard*, 120 N. C., 411 and 122 N. C., 602; *Rodman* v. *Town of Washington*, 122 N. C., 39. Under the authority of these decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An Act of the Legislature passed in violation of the Constitution of the State, or in disregard of its mandatory provisions, is to the extent of such repugnance, absolutely void; and all bonds issued thereunder bear the

brand of illegality stamped upon their face by the hand of the law.

The Act under which these bonds profess to have been issued was never legally passed and never became a law. As was said in *Norton v. Shelby County*, 118 U. S., 425, "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The Constitution of the State is plenary notice to the world of its organic law. There can be no *bona fide* holders of unconstitutional obligations, nor can ignorance of public statutes and legislative Journals be deemed otherwise than wilful or negligent. The Journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely no one would be heard to say that he was the *bona fide* owner of a piece of land simply because he held a deed therefor, when an inspection of the records would show that his grantor had no power to convey. It has been well said in *U. S. v. Macon County Court*, 99 U. S., 582, "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been *gross carelessness* on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals, or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality. A tree may yet live though its branches are badly shattered by the storm, but the last leaf falls when the root is dead.

This rule has been clearly laid down by the Supreme Court of the United States in the oft-cited case of *Anthony v. County of Jasper*, 101 U. S.. 693, where Chief Justice WHITE [*sic*] says: "Dealers in municipal bonds are charged with notice of the laws of the State

granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds now in question were put out the law required that to be valid they must be certified to by the Auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan* v. *Mining Co.*, 96 U. S., 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: "Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. *Neither is directory, but all are mandatory.* The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent."

By repeated adjudications this has become the settled rule of that court. *Police Jury* v. *Britton*, 82 U. S., 566, 570, 572; *Claiborne County* v. *Brooks*, 111 U. S., 400, 406; *Bank* v. *Porter Township*, 110 U. S., 608, 618; *Concord* v. *Robinson*, 121 U. S., 165, 167: *Kelley* v. *Milan*, 127 U. S., 139, 150; *Norton* v. *Dyersbury*, 127 U. S., 160, 175; *Young* v. *Clarendon Township*, 132 U. S., 340; *Hill* v. *Memphis*, 134 U. S., 198, 203; *Merrill* v. *Monticello*, 138 U. S., 673, 686, 687; *City of Brenham* v. *Bank*, 144 U. S., 173; *Savings Asso.* v. *Perry County*, 156 U. S., 692, 704.

But it is urged that while the bonds were expressly issued under the Act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds derived from an ordinance of the Constitutional Convention passed in 1868; and that therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of

the company or the issuing of the bonds, is as follows: "Section 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars." "Section 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the *same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the Act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company." That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: First: We do not see that any authority whatever is given or attempted to be given by either of these sections, to Wilkes county to subscribe to the capital stock of this company. But it is said that section 12, by referring to the charter of the "North Carolina and Atlantic Railroad Company," by which we presume is meant The Atlantic & North Carolina Railroad, chapter 136 of the Laws of 1852, confers upon the different counties, through or near which the Northwestern North Carolina Railroad may run, the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the Act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the *same manner and under the same rules, regulations and restrictions*" as are prescribed in the former Act. The words, "same restrictions," are peculiarly significant here, as the Act of 1852, section 45, provides in express terms that "if the said road be not *completed* within six years after the ratification of this Act, *this charter shall be forfeited.* Therefore, even if the powers granted in the Act of 1852 had been given to the Northwestern North Carolina Railroad Company or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be

held to be in the nature of a limitation and not a condition subsequent. That is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power. Section 12 of the ordinance of 1868 does not refer to section 33 of the Act of 1852, which confers the power, but is evidently limited by its very terms to sections 34, 35 and 36, which prescribe the *manner* in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in section 33, either in express terms or by reference to said section, but it has not done so and we cannot do so by judicial construction. There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule with the reasons therefor has been so clearly stated by Chief Justice PEARSON in *Railroad* v. *Reid*, 64 N. C., 155, 158, that we can do no better than to quote his language, as follows: "It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rule as contracts between individuals. In the latter case, the rules of common law, which is the same as common sense, is, 'words are to be taken in the strongest sense against the party using them', on the idea that the said interest induces a man to select words most favorable for himself. It is otherwise where the State is a party; for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that 'the promoters', as they are styled in England, or the 'lobby-members', as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being in its strict sense a *contract*, is more like the act of an indulgent head of the family dispensing favors to its different members and yielding to importunity. So the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and to adopt the meaning most favor-

able to the grantor." The same rule is laid down in *Railroad Co.* v. *Canal Commissioners*, 21 Pa. St. Rep. 9, 22, where Chief Justice Jeremiah S. Black, says for the Court: "It may be that the privilege which the relators claim might arise by implication out of their charter or some other Acts cited by their counsel, if we were at liberty to give them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the Legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This Court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the Legislature see to it. But let it be remembered that *nothing but plain English words will do it.*"

It should be borne in mind that there is no pretense of authority for the issue of these bonds outside of the charter of the North-Western North Carolina Railroad Company and its amendments. It has been the actor as well as the beneficiary throughout, and therefore

the Acts under consideration come peculiarly within the rule of strict construction laid down by the two great Chief Justices from whom we have quoted.

We have not overlooked the fact that in *Belo* v. *Commissioners*, 76 N. C., 489, this Court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the Act of 1852; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying Act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that "as the case is presented to us, that question does not arise and we do *not* decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The Court stated that "the principle of equitable estoppel is a most important element in the transaction" and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the County of Forsyth. Can it be questioned that estoppels must be mutual, and that he who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional Act of 1879. The case of *Hill* v. *Commissioners*, 67 N. C., 367, considering simply the power of the legislature to authorize the issue of bonds, has no bearing upon the present case. The Forsyth County bonds recited that *they* were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly ratified the 11th of August, 1868." The cases are clearly distinguishable. Another important point of difference is that the Forsyth County bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation. It is evident that the legislature as well as the railroad company itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained. But

with this essential difference. In the case at bar, the amendatory act having been passed in violation of mandatory provisions of the Constitution, in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In *Jarratt* v. *Moberly*, 103 U. S., 580, 588, the Court in discussing a simular case says: "Further legislation was needed. Such was the evident opinion of the Legislature of the State, for by an additional Act, passed on the 29th March, 1872, the authority was given in terms." And on page 685 it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to to give it effective operation and suppress the mischief at which it was aimed."

SECONDLY: The bonds on their face profess to have been issued under an entirely differently [*sic*] statute.

The principle laid down by the Federal authorities, and practically of universal acceptance, is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in *Town of Colonia* v. *Eaves*, 92 U. S., 484, as follows: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds, in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, *made in the bonds* issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; *for the recital is itself a decision of the fact by the appointed tribunal.*" *Buchanan* v. *Litchfield*, 102 U. S., 278; *Bank* v. *Porter*, 110 U. S., 608, 616.

In the case at bar the bonds recite that they were issued under the Act of 1879; and as all estoppels of this nature to be operative must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very Act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the Act met the constitutional requirements.

Certainly the estoppel can never go further than the recital itself. It cannot operate upon any other Act, nor as to the validity of any Act. In *Gilson v. Day-*

ton, 123 U. S., 59, it was held that "As it appears on the face of the bonds sued on in this action that they were issued under the special Act of February 18, 1857, which was held void in *Post* v. *Supervisors*, 105 U. S., 667, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed." As was said in *County of Davies* v. *Huidekoper*, 98 U. S., 98, 100, "There must indeed be power, which if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it." In *Dixon County* v. *Field*, 111 U. S., 83, 92, it was held that the estoppel arising from recitals, in the face of the bonds, never extended to or covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority to determine and to certify."

THIRDLY: That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none of the essential elements of a contract, and is held at the pleasure of the law making power. Much more so is it subject to constitutional restrictions. *Town of Concord* v. *Bank*, 92 U. S., 625, 630; *Concord* v. *Robinson*, 121 U. S., 165, 169; *Loan Asso.* v. *Perry County*, 156 U. S., 692, 697. *Concord* v. *Bank*, *supra*, was overruled in *Fairfield* v. *Gallatin*, 100 U. S., 47, only in so far as it applied to the Constitution of Illinois, and for the only reason that the Supreme Court of the United States deemed it proper, in the construction of a State Constitution, to follow the State decisions instead of their own view of the law. The general principle remains unchanged, and meets our approval.

The ratification of the Constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Artile II, Section 14, is as follows: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of

the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal." Article VII, Section 7, is as follows: "No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

The intention of the Constitution is obvious. Profiting by the sad experience of other States, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the legislature who assisted in such grant by forcing him to twice record his vote on the Journal, where it would be open to public inspection. It further intended that every such grant should be the deliberate and intelligent Act of the Legislature itself as well as of the community affected thereby. It is our duty to give to these salutary provisions that just construction, required alike by the rules of law and of common sense, that will effectuate and not destroy their beneficial purpose. This view we think is sustained by the uniform decisions of the Supreme Court of the United States, the only tribunal before which this decision can ever lawfully come for review. In *Wadsworth* v. *Supervisors*, 102 U. S., 534, 537 (citing and reaffirming *Aspinwall* v. *Commissioners of Davies County*, 22 How. 364) the Court says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to receive stock for the bonds. 'Until the subscription is made,' said Mr. Justice NELSON, speaking for the whole court, 'the contract is unexecuted and obligatory on neither party.' Hence the new State Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and

under the circumstances prescribed in that instrument." In *Norton* v. *Brownsville*, 129 U. S., 479, 490, Chief Justice FULLER, speaking for the entire Court, says: "These cases (referring to *Concord* v. *Savings Bank*, 92 U. S., 625, *Falconer* v. *Railroad*, 69 N. Y., 491; *Railroad* v. *Falconer*, 103 U. S., 821; *Wadsworth* v. *Supervisors*, 102 U. S., 534, and *Aspinwall* v. *Commissioners*, 22 Howard, 364) sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature and a constitutional inhibition upon the municipality itself. In the former case, past legislative action is not necessarily effective [quoted *sic*], while in the latter it is annulled. Of course if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first Section of Article II, but such a provision does not perpetuate any previous law, enabling a municipality to do that which it is subsequently forbidden to do by the Constitution. The inhibition being *self-executing* and operating directly on the municipality, and not in itself enabling the latter to proceed in accordance with the rule prescribed, *further legislation is necessary before the municipality can act.*" In the late case of *Railway* v. *Texas*, 170 U. S., 226, it is held that "a clause in a charter of a railroad company granting it power to consolidate with or become the owner of other railroads, is *not* such a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent, that the issuing of these bonds was authorized by Sections 1996 to 2000 of *The Code*. This question was definitely settled in *Commissioners* v. *Snuggs*, 121 N. C., 394, 400, 401, and we see no reason to reverse our ruling, nor do we find any facts taking this case from its operation. We can add nothing on this point to what was therein so fully and ably said in the opinion of the Court, except to say that if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the Constitution, inasmuch as they

practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun, and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad *in esse* or *in futuro* that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the Legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the Constitution and subject to its restrictions, it cannot, by a sweeping Act of unlimited application, utterly destroy its operation. If the Legislature or the railroad company or the county had placed any such construction on those Sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different. It is true that this road had been begun and was in one sense uncompleted when the subscription was made, but it was *not* begun when the Constitution was ratified, and the county at that time had no pecuniary interest in it, nor any interest contemplated by the Statute.

It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The Act of 1881 has no reference to the bonds in question and is subject to the same objections as the Act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer, who are in morals, if not in law, innocent holders of the bonds, but their loss comes from their misplaced confidence in those from whom they received the bonds, and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate

defective or unconstitutional legislation by judicial construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called repudiation of an unconstitutional obligation is a contradiction in terms, and its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financiering. This distinction we cannot endorse. It is just as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt, as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious and intelligent people may have reasons for their action as strong in morals as in law.

Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestige of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result, to retain the benefit and shift the burden.

In *Lewis* v. *Pina County*, 155 U. S., 54, 58, it was held that bonds issued under an Act of the Legislature of the Territory of Arizona, which was in violation of the Revised Statutes of the United States, were *void*, and "*created no obligation against the County which a court of law can enforce.*" In the carefully considered case of *Brenham* v. *Bank*, 144 U. S., 173, 182, 188, the court says: "It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the *well-settled rule that any doubt as to the existence of such power ought to be determined against its existence*, it ought not to be held to exist in the present case. * * * As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." Citing *Marsh v. Fulton County*, 10 Wall. 676, *East Oakland v. Skinner*, 94 U. S., 255; *Buchanan v.*

Litchfield, 102 U. S., 278 ; *Hayes v. Holly Springs*, 114 U. S., 120 ; *Davies County v. Dickinson*, 117 U. S., 657 ; *Hopper v. Covington*, 118 U. S., 148, 151 ; *Merrill v. Monticello*, 138 U. S., 673, 681, 682.

It has been suggested that the defence in this case has been only colorable, as but one of the bonds was represented. Under the circumstances we think that was sufficient. An elaborate answer, evidently prepared by able counsel, has been filed, presenting every reasonable defence ; and while no argument was made before us for the defendants, every phase of the case has been carefully examined by us in the five months during which we have held it under advisement. The plaintiffs had no means of knowing who held the bonds, as they are payable to bearer and pass from hand to hand without endorsement or registration. The bondholders themselves could have become parties at any stage of the proceedings, and would have been gladly heard by us ; but the mere fact that they deliberately refrained from any participation in the defence when they had every opportunity of doing so, should not deprive the plaintiffs of all power to protect the rights of the people they represent in a court of competent jurisdiction, where alone this action could be brought by them.

The current of authority from other States sustains the conclusions we have reached in this case, but owing to the large number of cases, we have thought it best to cite only from our own decisions and those of the Supreme Court of the United States.

For the reasons stated in this opinion, the judgment of the Court below is affirmed.

Affirmed.

FURCHES, J. (dissenting). On the 9th of March, 1868, the constitutional convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as the 'Northwestern North Carolina Railroad Company.' Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation, which subscription was held to be valid in *Hill v. Commissioners*, 67 N. C. 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of $100,000, and they were held to be valid against the county in *Belo v. Commissioners*, 76 N. C. 489, and the work of constructing said road between Greensboro, in

the county of Guilford, and Winston, in the county of Forsyth, was commenced. This part of the road was completed and put into operation within the next few years, and has continued to be run and operated ever since. This charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes county, provided Wilkes county would make a subscription of $100,000 to the capital stock of said company. This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of said county, by the commissioners thereof; the vote taken; a majority of the whole qualified voters of said county voted for the subscription. The subscription was made, and the road built to Wilkesboro, in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railrord company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the record, and are admitted to be true. But there having been a change in the personnel of the board of commissioners since said bonds were issued, and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds,—the want of power in the commissioners to submit the proposition to the voters, and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous, and should be reversed. I admit that, if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes, that these bonds are void and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

The charter (the ordinance of the convention) in express terms makes the charter of the Atlantic & North Carolina Railroad Company a part of the charter of the Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties

to the capital stock of the company. This being so, the charter of the Atlantic & North Carolina Railroad Company is to be read and considered as a part of the charter of the Northwestern North Carolina Railroad Company. *Range Co. v. Carver*, 118 N. C. 328; *Commissioners v. Higginsbothern*, 17 Kan. 62. It is like an instrument referring to another instrument *(Flaum v. Wallace*, 103 N. C. 296*)*, or where the complaint in one action refers to the complaint in another action for data *(Alexander v. Norwood*, 118 N. C. 381*)*; they are to be read and considered together as one instrument. I have shown that the subscription made to this company (the Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in *Hill v. Commissioners, supra*. This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of *Belo v. Commissioners of Forsyth*, in a mandamus proceeding, to compel their payment, and their legality was again sustained by this Court. *Belo v. Commissioners*, 76 N. C. 489. This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a county court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the constitution of 1868, which did not go into effect until the 22nd of April of that year. By this constitution and subsequent legislation, the county court was abolished, and the county commissioners succeeded to their powers in this matter, and in all such cases. It is so held by this court in *Belo v. Commissioners, supra*, and it is expressly so provided by the legislature. Section 1997 of *The Code*.

Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, that it was passed before the constitution of 1868 went into effect, and that it was thereby repealed. To support this position, *Aspinwall v. Commissioners of Davies County*, 22 How. 364, and *Lewis v. Pina County*, 155 U. S. 54, are cited by the court. Neither of these cases, in my opinion, sustain the position for which they are cited. The first case cited (22 Howard) is intended to raise the question of violating a contract under the constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the constitution of the state (Indiana) had been amended so as to prohibit any county in the state from issuing such bonds. But Davies county proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended constitution, amounted to a contract; and that the new constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the constitution of the United States.

But it is denied by the defendants that the constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes county from making this subscription or issuing these bonds, as I expect to show. The case of *Lewis v. Pina County* arose out of the legislation of Arizona territory. The legislature of this territory passed an act authorizing Pina county to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by congress. And it was held in that case that congress had not only failed to grant such legislative

power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of the Northwestern North Carolina Railroad was passed before the adoption of the constitution of 1868, which took effect on the 22d of April of that year. But the legislature passed an act, ratified on the 11th of August, 1868, as follows: 'Section 1. The general assembly of North Carolina do enact, that an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed.' If there had been a repeal of this charter by the constitution, which I contend there had not been, it seems to have been re-enacted in August, 1868.

It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by any one for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I cannot feel bound by an agreement as to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the commissioners of Wilkes county to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters 'voting thereon shall be in favor of the subscription.' To this extent, and no further, did the constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of the Code, which was admitted to have been passed as the constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of the Code had been passed

by the legislature, as an amendment to this charter, with all the formalities and requirements of the constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of the Northwestern North Carolina Railroad, from Winston to Wilkesboro, for the subscription of counties to its capital stock, and the issue of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and noes, as provided by the constitution, and, for that reason, that the said act is void, under *Bank v. Commissioners*, 119 N. C. 214, and *Commissioners v. Snuggs*, 121 N. C. 400. But the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the convention chartering said road. So that any one seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter; that is, the ordinance of the convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners, except the act of the 20th of February, 1879, and that act being void for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity, and cannot benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are es-

topped to show that the commissioners had any other authority except the said act of 1879. With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see Bigelow on Estoppel, pp. 4, 5, 6 and 7, and 356, and note 1: 'It is not the deed of the defendant, but of Isham (the grantor) only, by whom alone it is executed; and, not being the deed of the defendant, it cannot, as a deed, estop him from denying that the grantor had title.' And the same principle is held in the case of *Northern Bank v. Porter Township*, 110 U. S. 608, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowlege of,—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law,—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes county had the power—legal authority—to issue these bonds? It is said in the opinion of the court that 'estoppels are mutual,' and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from Bigelow on Estoppel and from *Northern Bank v. Porter Township*. But, were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?

"The court, in its opinion, says that certain positions were strenuously insisted on by the defendant. I

think this must be a mistake, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But, as to the conduct of the case before this court is concerned it has been unilateral. The opinion of the court speaks of the reorganization of the railroad company, thereby defrauding some one out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the court that the supreme court of the United States is the only court authorized to review this opinion. I agree with the court in this expression of opinion, but I have no idea that it will ever be reviewed by that court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely they will appeal. It is said that the talk of repudiation has had no effect on the court, and I have no idea that it has; and I hope that my aversion to repudiation has had no influence on me in coming to the conclusions I have reached. My opinion is that the bonds are valid, and that their payment should be enforced by the courts."

"FAIRCLOTH, C. J. I concur in the dissenting opinion."

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